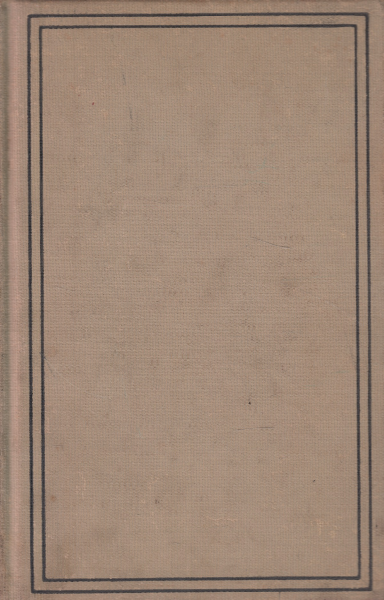








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

JULY 1, 1944, TO JANUARY 31, 1945

WITH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

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*Recalled November session, 1944.

[1] On military leave, as of November 2, 1942; lieutenant commander, U. S. Naval Reserves, on active duty.

[2] On leave as of September 22, 1943, with War Food Administration.

[3] Temporary Commissioner December 7, 1943, vice W. Ney Evans, on military leave.

[4] On military leave, as of October 20, 1942; lieutenant colonel, U. S. Army, on active duty.

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AMENDMENTS TO RULES

Order of the Court Amending Rule 39

It is ordered this 17th day of November, 1944, that the Rules of the Court of Claims be and the same are hereby amended by adding after RULE 39 (a) a paragraph to be known as 39 (b), reading as follows:

> (b) In any case, the court, on its own motion or on that of either party, may order that the hearings before the commissioner to whom the case is referred shall be limited to the issue of whether or not the United States is liable for any portion of the moneys sought to be recovered therein. On the entry of such an order, the commissioner shall so limit the hearings before him and, after both parties have closed their proof on said issue, shall report to the court the facts pertaining thereto. Thereupon, and after exceptions, briefs, and oral arguments of the parties have been duly filed and heard, the court shall determine the facts and the law as they relate to the aforesaid issue. If the court holds in favor of the plaintiff, it shall enter an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings.

Order of the Court Amending Rule 39

It is ordered this 9th day of February, 1945, that the Rules of the Court of Claims be and the same are hereby amended by adding after RULE 39 (b) a rule to be known as 39 (c), reading as follows:

(1) A summons under Sec. 14 (b) of the Contract Settlement Act of 1944, may be issued by the court on its own motion or on motion of a party. A notice under that section may similarly be issued on motion of the Attorney General. The motion shall state the name and the last known address of the person sought to be summoned or notified and shall state what interest in the suit or proceeding such person claims or appears to have.

If such motion is filed after the case has been referred to a commissioner, the motion shall state when the moving party first became aware of such person's possible interest and shall show that it was not for want of due diligence that the existence of such interest did not sooner come to the party's knowledge. Such motion shall be filed in the clerk's office together with sufficient copies thereof for service by the clerk upon all existing parties. Any objection to the motion shall be filed within 10 days after the filing of such motion, unless the time is extended, but the court may act upon any such motion at any time after its filing without awaiting the filing of objections thereto.

When the court, on motion of a party, orders the issuance of such summons or notice, the moving party shall cause such summons or notice, together with a copy of the printed record in the case, to be served by the United States Marshal in the judicial district wherein the person named in the summons or notice may be found and the return shall be made directly to the clerk of the court. When the court orders the issuance of such a summons on its own motion, the existing parties shall, within 10 days, file one additional copy of each pleading theretofore filed by them for each additional party to be summoned, and the clerk shall forthwith issue such summons and forward the same, together with a copy of the printed record in the case, to the Attorney General for service by the United States Marshal in the judicial district wherein the person named in the summons may be found. Where the United States desires a judgment *pro confesso* to be entered in the event that a person summoned at its behest fails to appear, it shall file with its motion an appropriate pleading setting

forth its claim or contingent claim upon which judgment *pro confesso* is desired against such person, and the same shall become a part of the printed record, a copy of which is required to be served with the summons.

The summons or notice shall contain the names of the parties, the names and addresses of their attorneys of record, and the time within which the person is required to appear and defend, and shall state that in case of his failure to do so, any and all claims or interest in claims which he may have against the United States, in respect of the subject matter of such suit or proceeding, shall forever be barred. If a claim or contingent claim has been asserted by the United States against such third person, the summons shall also state that judgment *pro confesso* may be entered against him upon any such claim or contingent claim to the same extent as if he had appeared and admitted the truth of all the allegations made on behalf of the United States.

(2) Whenever a party shall file an affidavit showing that a third person sought to be so summoned resides outside of the jurisdiction of the United States or for any other good and sufficient reason appearing to the court cannot be personally served, the court may enter an order which the clerk shall cause to be published in some newspaper or newspapers designated in the order as most likely to give notice to the party to be served, for a specified time, not less than once in each of 4 successive weeks. Every such order shall give the style of the suit, state briefly its object, and shall inform the person summoned that he must appear within 40 days after the date of first publication to do what is necessary to defend his interest. On or before the day of the first publication the clerk shall send the summons by registered mail addressed to such person at his last known address. The certificate of the clerk that he has sent such summons shall be evidence that he has done so. The costs of such service shall be paid by the party at whose instance it is made.

(3) A person summoned or notified under this rule (hereinafter called the third party) may, within 40 days after the service of the summons or notice, unless the court, for cause shown, specifies a different time, file a printed petition in accordance with Rules 1 and 8 to 17, inclusive, setting forth specifically and concisely how he claims to be interested and submitting the question raised to the decision of the court. In the event the United States has asserted a claim or contingent claim, and such matter is the only interest which said person has in the proceeding, the pleading filed need not be

a petition but may be an answer under oath, addressed only to the matters raised by the pleading of the United States.

All such petitions and answers, as well as all other papers thereafter filed in the case, shall carry the original title and docket number of the case.

(4) Within 40 days after the filing of a petition by a third party, each of the parties shall file a demurrer, plea, answer or other pleading in the premises. If any counterclaim, set-off, claim of damages or other demand is set forth in such responsive pleading, said third party shall, within 40 days after the filing of such pleading, answer the same by replication under oath, unless the court extends the time. However, unless and until the third party asserts a claim or interest in a claim against the United States, the United States shall not be heard upon any counterclaims, claims for damages or other demands against such party, other than claims and contingent claims for the recovery of money paid by the United States after July 1, 1944, in respect of the transaction or matter which constitutes the subject matter of the case.

(5) A person who has been made a third party shall be entitled to receive copies, as if he had been an original party, of all papers thereafter filed in the case. Sufficient copies shall be filed of all such papers, in addition to the number otherwise required under these rules, to provide the same number of copies for each third party as are required to be provided for an original party.

If the third party files a petition or an answer, the court may order the issues between the plaintiff and the defendant and the third party, or between any or either of them, to be tried in such manner as the court may direct. As provided in Sec. 14 (b) of said act, the case as to such third party shall be treated as an independent proceeding which has been consolidated, for purposes of trial and determination, with the case with respect to which the summons or notice was issued. The court may order such proceedings to be taken, pleadings or documents to be delivered, or amendments to be made, as shall appear proper for having the rights and liabilities of the parties determined and enforced most conveniently and with as little embarrassment and delay to the original parties as the interests of justice may require.

Wherever this rule refers to action by the court, such action may be taken by the Chief Justice or, in his absence, by the senior judge present.

LEGISLATION RELATING TO THE COURT OF CLAIMS

[PRIVATE LAW 396—78TH CONGRESS]
[CHAPTER 466—2D SESSION]
[H. R. 2624]

AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of J. R. Dixon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon, notwithstanding the laches or lapse of time or any provision of law to the contrary, the claim of J. R. Dixon, of Nansemond County, Virginia, against the United States for damages alleged to have been sustained as a result of injuries to certain oyster beds and oysters on such beds, operated by the said J. R. Dixon under perpetual franchise or lease from the Commonwealth of Virginia, caused by officers, employees, and/or agents of the United States in performing dredging operations in the Nansemond River during the years 1941, 1942, and/or 1943. Such suit shall be instituted within six months from the date of enactment of this Act, and the liability of the United States in such suit shall be determined upon the same principles and measures of liability as in like cases between private individuals.

Approved September 30, 1944.

[PRIVATE LAW 443—78TH CONGRESS]
[CHAPTER 529—2D SESSION]
[H. R. 2097]

AN ACT

Conferring jurisdiction upon the Court of Claims of the United States to consider and render judgment on the claim of W. J. Cox against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims of the United States be, and hereby is, given jurisdiction to hear, determine, and render judgment on the claim of W. J. Cox, of Roanoke, Virginia, against the United States for personal injuries received by him when he was struck by a United States Army ambulance on United States Highway Numbered 11 near Christiansburg, Virginia, on June 3, 1940.

SEC. 2. Suit upon such claim may be instituted at any time within one year after the enactment of this Act, notwithstanding the lapse of time or any statute of limitations. Proceedings for the determination of such claim and appeals from and payment of any judgment thereon shall be in the same manner as in the case of claims over which the court has jurisdiction under section 145 of the Judicial Code, as amended.

Approved December 7, 1944.

[PRIVATE LAW 445—78TH CONGRESS]
[CHAPTER 531—2D SESSION]
[H. R. 2576]

AN ACT

To confer jurisdiction upon the Court of Claims to determine and render judgment for any losses suffered by Duffy Brothers, Incorporated

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the lapse of time and notwithstanding section 4 of the Act of June 16, 1934 (48 Stat. 975), jurisdiction is hereby conferred upon the Court of Claims to consider all questions of law and fact and to determine and render judgment for any losses (excluding any amount claimed for accrued interest thereon) suffered by Duffy Brothers, Incorporated, resulting from alleged increased costs of performing a contract entered into between said Duffy Brothers, Incorporated, and the United States, said costs allegedly being increased as a result of the enactment of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 193): *Provided,* That such suit shall be brought within six months of the enactment of this Act.

Any judgment rendered in favor of the claimant, Duffy Brothers, Incorporated, shall be paid in the same manner as other judgments of said Court of Claims are paid.

Approved December 7, 1944.

(See 89 C. Cls. 528.)



CASES DECIDED

IN

THE COURT OF CLAIMS

July 1, 1944, to January 31, 1945, and other cases not heretofore published

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STANLEY M. FOLKMAN v. THE UNITED STATES

[No. 45643. Decided October 4, 1943]

On the Proofs

Pay and allowances; increased subsistence and rental allowances; Army officer, on active duty, with dependent mother.—Decided upon the authority of *Donald K. Mumma* v. *United States*, 99 C. Cls. 261; *DuBois* v. *United States*, 99 C. Cls. 268; *Johnson* v. *United States*, 99 C. Cls. 553.

The Reporter's statement of the case:

Mr. Samuel T. Ansell, Jr., for the plaintiff. *Mr. Mahlon C. Masterson and Ansell, Ansell & Marshall* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, Stanley M. Folkman, a bachelor officer in the United States Army, was appointed Second Lieutenant in the Quartermaster Reserve Corps on February 23, 1931, reappointed Second Lieutenant February 11, 1936, and promoted to First Lieutenant June 17, 1936. June 9, 1941, he was reappointed First Lieutenant, and was promoted to Captain, February 1, 1942, which rank he now holds. He has been on active duty continuously since March 5, 1941.

Plaintiff claims the statutory rental and subsistence allowances of an officer of his rank with a dependent mother for the period from March 5, 1941, to the date of judgment.

2. Since March 5, 1941, plaintiff's mother, Julia Folkman, has been dependent upon him for her chief support by reason of the following circumstances: Plaintiff's father, Herman Folkman, an insurance agent, died intestate and insolvent on December 13, 1940. He left a $9,000 life insurance policy to plaintiff's mother, $5,000 of which she left on deposit with the insurance company at two percent interest and $4,000 of which she received in cash. She used the latter amount, with the exception of about $500, to pay the decedent's debts.

Plaintiff's mother was born January 18, 1874, and has two children, plaintiff and his sister. She did not remarry after the death of plaintiff's father, and has not been employed in any gainful occupation.

The mother owns her home in Reading, Pennsylvania, worth approximately $2,800, and stock valued at less than $500. About January 1, 1942, she received a legacy of approximately $2,500, about $400 of which she has spent and the remainder she intends to invest. Her annual income, other than plaintiff's contributions, consisted of $40 from the stock and $100 interest on the life insurance policy. She received about $60 per year in commissions for renewals of insurance policies sold by her husband during his lifetime. She paid the insurance commissions to her daughter who used the money to buy clothing and pay automobile and other expenses incurred by the daughter in making collections from policyholders and keeping books on the insurance business.

Since the commencement of this suit and for many years prior thereto, plaintiff's mother has lived in her home in Reading. Her daughter lives with her, but has been unable to contribute anything for her room and board, or to the support of her mother. The daughter has had no income except the returns from the insurance business. The mother's household expenses, aside from the daughter's room and board, averaged $150 a month, and the cost of her clothing, doctors' bills, recreation, and incidentals averaged $25 a month. Taxes on her home amount to $200 a year, and $300 has been expended for repairs and improvements to the house since March 5, 1941.

Plaintiff has contributed not less than $100 a month regularly to the support of his mother. In addition, he gave her money and other things of value from time to time, and paid for the installation of a heating system in the home, amounting in all to about $500.

3. From March 11, 1941, to April 15, 1941, plaintiff was on active duty at Fitzsimons General Hospital, Denver, Colorado, where he occupied Government quarters, consisting of one room, about ten feet square, furnished with a steel folding cot, a chest of drawers, and a table. Plaintiff purchased a lamp and rug at a cost of $16.50. He and other officers had the use of toilet facilities provided elsewhere in the building.

From April 19, 1941, to December 23, 1941, plaintiff was on active duty at Billings General Hospital, Fort Benjamin Harrison, Indiana. When he reported for duty, Government quarters were not ready for occupancy, and he secured private quarters until June 9, 1941, for which he later received a rental allowance. June 10, 1941, he was assigned Government quarters, consisting of one room, about ten feet square, furnished with a metal folding cot. Toilet facilities nearby were available to plaintiff and other officers. Plaintiff spent $85 for a chest of drawers, a chair, a rug, and an electric fan.

Plaintiff reported for duty at Fort Gulick, Canal Zone, on January 12, 1942. He was assigned one room, about ten feet square, containing a metal folding cot and a chest of drawers. Plaintiff purchased a rug and shower curtain at a cost of about $6. On February 14, 1942, these quarters were terminated and other similar quarters assigned to plaintiff, which he occupied on June 29, 1942, when testimony was taken in this case. The War Department considered that the quarters assigned plaintiff were adequate for an officer of his rank without dependents.

4. The quarters assigned to and occupied by plaintiff were not adequate for an officer of his rank with a dependent, and at no time has he been paid rental and subsistence allowances on account of a dependent. He filed a claim for such allowances with the General Accounting Office but his claim was denied.

Rental and subsistence allowances on account of a dependent mother for an officer of plaintiff's rank and length of service for the period from March 5 to November 30, 1941, amount to $485.27. This is a continuing claim.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case are not in dispute. Plaintiff's mother was in fact dependent upon him for her chief support during the period of this claim. Plaintiff is entitled to recover. The judgment is suspended pending the receipt of a report from the General Accounting Office showing the amount due under the special findings of fact and the opinion in this case. *Mumma* v. *United States*, 99 C. Cls. 261; *DuBois* v. *United States*, 99 C. Cls. 268; and *Johnson* v. *United States*, 99 C. Cls. 553. It is so ordered.

In accordance with the above opinion, and upon a report from the General Accounting Office showing the amount due thereunder, and upon motion for judgment by plaintiff, judgment was entered for the plaintiff in the sum of $1,039.81, June 5, 1944.

THE BEST BUTTER COMPANY v. THE UNITED STATES

[Nos. 44008 and 45764. Decided January 3, 1944]

On the Proofs

Tax on adulterated butter; claim for refund; determination of Commissioner.—Where the butter which was the subject of the tax in the instant cases as adulterated butter had been manufactured by others and had been purchased wholesale by plaintiff and subsequently rechurned or reworked in churns by plaintiff; and where in such process of rechurning or reworking water was added; it is *held* that by the greater weight of the evidence submitted, which was conflicting, it is established to the satisfaction of the court that plaintiff did manufacture adulterated butter during the taxable period involved and that plaintiff in so doing engaged in manufacturing adulterated butter as a business within the meaning of the statute. (Section 4 of the

Act of May 9, 1902; 32 Stat. 194, 196; U. S. Code, Title 26, section 2321.)

Same; determination of Commissioner.—The finding by the Commissioner of Internal Revenue, upon the evidence before him, that plaintiff was a manufacturer of adulterated butter as a business and the determination of the Commissioner as to the number of pounds of adulterated butter that plaintiff had produced, upon which the taxes and penalties were assessed, were *prima facie* correct; and in a suit for refund plaintiff has the burden of showing that such determination and assessment are erroneous or illegal; and it is *held* that in the instant cases plaintiff has not sustained that burden of proof, since the record as a whole supports, rather than disproves, the determination and assessments of the Commissioner and the amounts thereof, and accordingly plaintiff is not entitled to recover.

Same; tests by samples.—Where only a portion of the butter taxed as adulterated butter, sold by the plaintiff, was actually sampled and tested as provided in the pertinent regulations; it is *held* that there is nothing in the statute taxing adulterated butter or in the regulations relied upon that prohibits the Commissioner from determining and taxing the amount of adulterated butter manufactured on evidence other than by taking samples and making formal tests, and in the instant cases such evidence was sufficient both for the Commissioner and the court, and plaintiff is not entitled to recover.

Same; regulations directory.—The regulations concerning the taking of samples were directory rather than mandatory. Cf. *United States* v. *Michel*, 282 U. S. 656, 661.

The Reporter's statement of the case:

Mr. David J. Shorb and *Mr. Earle W. Wallick* for plaintiff.
Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

The two petitions filed herein relate to the same taxable periods and to the same assessments of taxes and penalties. The petition in No. 44008 was filed to recover $450 with interest upon rejected refund claims for that amount of tax paid to the date of such claims. The petition in No. 45764 was filed to recover $6,938.49 additional, with interest, subsequently paid on the same assessments and for which refund claims were also filed and rejected.

The controlling questions presented are (1) whether plaintiff was a manufacturer of adulterated butter by en-

gaging in the production of adulterated butter as a business within the meaning of Section 4 of the taxing act of May 9, 1902 (32 Stat. 194, 196; U. S. Code, 1940 ed., Tit. 26, Sec. 2321; Internal Revenue Code Sections 2320 (b) and 2322); (2) whether plaintiff manufactured any adulterated butter; (3) whether the number of pounds of butter held by the Commissioner of Internal Revenue to have been adulterated, and upon which plaintiff was assessed, was excessive or erroneous; and (4) whether the amount of the tax which can legally be exacted of plaintiff should be limited to the number of pounds contained in the specific boxes or containers from which samples were taken and found to be adulterated.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of Illinois, and has been engaged in the manufacture and sale of butter in Chicago, Illinois, since 1932.

2. In case No. 44008 the petition was filed July 7, 1938, to recover $450 paid up to that time on tax assessments made against plaintiff in 1936 and 1937, aggregating $9,476.70. The testimony was heard during 1940 and 1941. Proof for both sides was closed December 26, 1941. March 11, 1942, the court allowed defendant's motion to reopen the case and to file a counterclaim which asks for judgment against plaintiff for the balance of the aforesaid tax assessments and interest unpaid. Plaintiff's answer to defendant's counterclaim was filed April 21, 1942, alleging all of the 1937 tax assessment and most of the 1936 tax assessment had been paid since plaintiff's petition was filed.

A stipulation of facts was filed by the parties on October 14, 1942, which, among the facts stipulated, sets forth the amount of taxes paid on the 1936 and 1937 assessments, as hereinafter shown.

In case No. 45764 the petition was filed October 10, 1942, to recover $6,938.49 paid on the aforesaid tax assessments of 1936 and 1937. Case No. 44008 and case No. 45764 relate to the same subject matter. The petition in case No.

45764 is in substance an amended petition to the petition in case No. 44008 because of additional payments and the filing of additional refund claims, and, also, for the purpose of making the pleadings conform to the proof.

3. May 25, 1936, and again on January 26, 1937, M. G. Krueger, an Internal Revenue Agent, accompanied by Inspector John T. Sullivan of the Pure Food and Drug Administration, visited plaintiff's place of business in Chicago and made an investigation and examination of plaintiff's method of manufacturing butter. During each of these investigations and examinations samples of butter were taken and, following analyses of such samples taken, Krueger recommended to the Commissioner of Internal Revenue that plaintiff be considered a manufacturer of adulterated butter and that appropriate taxes be assessed. Taxes were accordingly assessed against plaintiff as hereinafter shown.

4. 21 U. S. C., Sec. 321 (a), defines butter, and on the fat content states:

> * * * and containing not less than 80 per centum by weight of milk fat, all tolerances having been allowed for.

26 U. S. C., Sec. 2320 (b), defines adulterated butter.

26 U. S. C., Sec. 3206 (a) (2), imposes on manufacturers of adulterated butter a special tax of $600 a year.

26 U. S. C., Sec. 2321 (a) (1) and (b), provides for the assessment and collection of a tax of 10 cents per pound upon adulterated butter to be paid by the manufacturer.

5. Plaintiff was engaged in the manufacture of butter from cream and also in the rechurning or reworking of butter purchased in tubs containing about 63 pounds each from H. C. Christians Company and Peter Fox & Sons, both of which companies were large wholesale dealers in Chicago.

6. At the beginning of the hearing in this case the parties entered into a stipulation as follows:

> None of the butter which plaintiff manufactured from cream is in controversy here. The controversy revolves around the butter which was bought by the plaintiff from others and was reworked in plaintiff's plant.

May 25, 1936, and again on January 26, 1937, a sample of butter from a tub, purchased by plaintiff in tubs from the wholesale dealers aforesaid, was taken and analyzed and found to contain not less than 80 percent fat. During the hearing both parties appear to have proceeded on the assumption that the butter purchased in tubs from the wholesale dealers contained not less than 80 percent fat; that is, was legal butter. No contention or proof to the contrary was submitted.

7. The issues in this case revolve around (a) whether plaintiff was a manufacturer of adulterated butter, and (b) whether the taxes imposed against plaintiff, in whole or in part, were properly assessed. Some of the butter tested from plaintiff's plant had less than 80 percent of fat and an excess of moisture (water), which led to the assessment of taxes involved in this suit.

8. On the matter as to how the butter purchased in tubs from wholesale dealers was rechurned, the testimony is in irreconcilable conflict. Plaintiff's officers and employees who testified insist the butter from the tubs was rechurned without the addition of water, and that the only purpose of rechurning the butter was to get the proper pliability to repack in Friday boxes. Rechurning in this manner would not increase the moisture content of the butter. Based on admissions of officers of plaintiff to defendant's aforenamed officers at the time of their investigations, the observation of said defendant's officers of one rechurning operation with warm water added to the butter, and the assumption that the butter purchased in tubs from the wholesale dealers was legal, the conclusion is inescapable that the excess moisture found in the rechurned butter was absorbed in the operation of rechurning the butter with water and that after the rechurning the butter was not sufficiently worked or reworked, if at all, to eliminate excess moisture. Plaintiff submitted no evidence to show that any of the butter purchased by it from wholesalers and rechurned contained less butter fat or more moisture than permitted by law when received by it and before it was rechurned. Such samples of this butter before it was rechurned as were taken by defendant's offi-

cers showed that such butter met all the requirements of the statute as to fat and moisture before it was rechurned.

The evidence shows that it was not necessary to rechurn the butter purchased in tubs, with or without water, in order to obtain the proper pliability to repack in Friday boxes, as that pliability could have been obtained by letting the butter in tubs stand in ordinary room temperature for 24 hours without any deterioration of the butter.

9. In the manufacture of butter from cream there are two well-known operations: (1) the churning which results in butter and buttermilk, and (2), after the separation of the buttermilk from the butter, the butter is worked in order to bring about the proper cohesion and to eliminate excess moisture. In the rechurning of the butter taken from the tubs purchased from the wholesale dealers the record does not show whether the butter so rechurned was afterwards worked or reworked for any purpose. The record discloses that the rechurned butter was packed in Friday boxes, placed in the refrigerator to cool, and then removed in order to be cut with a hand-operated Friday cutter into prints to be sold to plaintiff's customers. Whether the butter manufactured from cream was packed in Friday boxes is not disclosed by the record.

10. Inspector Sullivan had been engaged for over 20 years in making factory inspections and checking on creameries, butter factories, cheese factories, and other food establishments, taking samples. The purpose of Sullivan's inspections was to ascertain if the products manufactured complied with the requirements of the Food and Drug Act.

11. Inspector Sullivan visited plaintiff's plant a number of times other than the two times he accompanied Krueger, referred to in finding 3. He visited the plant February 17, 1932, and took a sample of butter, which when analyzed showed a fat content of 71.68 percent. On April 12, 1932, Sullivan took three samples of butter which had fat contents of 81.90, 80.95, and 81.08 percent, respectively. A sample taken April 27, 1937, had a fat content of 79.85 percent. A sample taken on May 28, 1937, had a butter fat content of 81.28 percent.

The inspector did not know whether these samples of butter were reworked butter or creamery butter.

12. March 23, 1936, Inspector Goodman called at plaintiff's plant to inspect the quality of cream. While there he observed tubs of butter dumped into a churn. He observed nothing further of this operation but reported what he had seen to Inspector Sullivan.

JUNE 1936 ASSESSMENT

13. Inspector Sullivan received instructions to accompany Internal Revenue Agent Krueger on a visit to plaintiff's plant. The two called there in the afternoon of May 25, 1936. They first saw J. C. Hanzlik, vice president of plaintiff. Hanzlik called Novak, secretary and treasurer of plaintiff, and told him that Krueger was a Government officer and wanted to go through the plant with Sullivan. Novak followed them through the plant. He told them the firm was churning from cream about 30,000 pounds of butter monthly, and was in addition manufacturing about 40,000 pounds of reworked butter. He told them that the butter which was reworked was purchased from Peter Fox & Sons and H. C. Christians Company; that the butter was received in tubs and was allowed to remain on the churn floor for several hours until it softened sufficiently, after which it was thrown into the churn which had previously been partly filled with warm water and rechurned, and that this method of reworking butter had been employed for a considerable length of time. These statements of Novak are not refuted in the proof offered by plaintiff. Novak also told them that no record of moisture and fat contents was kept but that the butter maker did make tests on each rechurning. While Krueger and Sullivan were in the plant that afternoon no churning operations took place. At the time there were 11 tubs of butter, purchased from H. C. Christians Company, standing along the side of the churn. Krueger and Sullivan went to the cooler and there found rechurned butter in 32 Friday boxes, also several cartons containing one-pound prints, quarter-pound prints, some five-pound and ten-pound rolls, 6 ten-pound tubs, 2 thirty-pound tubs, and 1 sixty-

pound tub. A Friday box is 15 inches square by 18 or 20 inches high, and the bottom is removable.

14. Inspector Sullivan took 13 samples from the butter referred to in the preceding finding, and one sample from a tub of butter standing along the side of the churn. These samples were duly analyzed. The sources of the samples and the percentage of moisture and butter fat contents of each are as follows:

Number	Moisture	Butter fat
Friday box 91	22.02	74.97
Friday box 93	24.08	73.11
Friday box 94	20.90	76.55
Friday box 95	21.26	75.77
Friday box 96	21.76	75.27
Friday box 96–R	23.14	74.31
Friday box 250–88	25.81	73.58
Friday box 251–91	25.45	73.84
Friday box 251–63	25.92	73.28
One-pound print	22.57	74.19
One-pound print ("The Best Brand")	15.84	83.43
One-pound print ("The Best Brand")	16.01	81.07
Quarter-pound print (from wrapping table)	20.96	76.09
Sample from tub (Christians)	16.24	80.37

Plaintiff did not assign stock or lot numbers to the tubs or Friday boxes of butter. The numbers shown on the Friday boxes from which Inspector Sullivan and Revenue Agent Krueger took their samples, as reflected in the numbers shown in the above schedules, represented the weights of the contents of the Friday boxes.

15. Internal Revenue Agent Krueger filed a report and recommended to the Commissioner of Internal Revenue that plaintiff be considered a manufacturer of adulterated butter and that appropriate taxes be assessed. He recommended a special tax of $50 a month for March, April, May, and June 1936, and a tax of 10 cents per pound on 82,500 pounds of adulterated butter. This amount of butter was arrived at by Krueger on the statement of Novak that about 40,000 pounds of butter purchased in tubs from wholesale dealers were rechurned per month, and the time taken was from March 23, 1936, when Goodman visited plaintiff's plant, alluded to in finding 12, to May 25, 1936, when Krueger and Sullivan visited plaintiff's plant. The agent also recommended a 15-percent penalty for failure to pay the manufacturer's special tax.

16. The Commissioner, upon consideration and upon the evidence before him, approved the recommendations of Krueger and assessed on the June 1936 Miscellaneous Tax List the following taxes against the plaintiff: Manufacturer's special tax $200; stamp tax on 82,500 pounds of adulterated butter at 10 cents per pound, $8,250; and penalty for failure to pay the manufacturer's special tax $30, or, an aggregate assessment of $8,480. Plaintiff received notice from the Collector of Internal Revenue to pay the tax so assessed and up to the filing of the petition in case No. 44008 payments were made as follows:

June 15, 1937	$100
July 7, 1937	100
August 5, 1937	100

17. September 8, 1937, plaintiff filed a claim for refund (plaintiff's exhibit 1) in the amount of $300, giving as reasons in support thereof that the plaintiff was not a manufacturer of adulterated butter within the meaning of the statute, and that none of the butter manufactured by plaintiff during the year 1936 was adulterated.

March 21, 1938, the Commissioner of Internal Revenue advised the plaintiff by letter (plaintiff's exhibit 3) of his purpose to reject the claim, one paragraph of which reads as follows:

> You are advised that article 101 of Regulations 9, relative to certain classes of adulterated butter, includes the following:
>
> "(3) Butter manufactured or manipulated by any process or with any material resulting in the absorption of abnormal quantities of water, milk, or cream. Emulsified or milk-blended butter comes within this class."

The claim was rejected on a schedule dated March 31, 1938.

18. Since the petition in case No. 44008 was filed plaintiff has made payments on the taxes so assessed, referred to in finding 16. At the date the taking of proof was closed the balance of the assessment remaining unpaid was $1,960.63, and there was then outstanding against plaintiff, on the Collector's records, accrued interest on the said assessment in the amount of $2,439.14, making an aggregate unpaid balance on the June 1936 assessment of $4,399.77.

19. June 6, 1942, plaintiff filed a claim for refund (exhibit D to the stipulation) in the amount of $5,894.37, and in support thereof gave as reasons that none of the butter manufactured by plaintiff was adulterated, that it was not the manufacturer of the butter purchased and repacked by it, and that it did not adulterate such butter in repacking.

September 5, 1942, the Commissioner of Internal Revenue rejected the claim and his letter of rejection is in substance the same as the one referred to in finding 17.

APRIL 1937 ASSESSMENT

20. In the afternoon of January 26, 1937, Krueger and Sullivan again visited plaintiff's plant. At that time they were accompanied during the inspection by the vice president of plaintiff, J. C. Hanzlik. A churn was in operation and Mr. Hanzlik advised that the plaintiff firm was rechurning butter that had been purchased from Peter Fox & Sons, and that plaintiff was employing the same method it had employed on their previous visit. He also told them that at the time the firm was churning from cream about 20,000 pounds of butter monthly, and in addition was manufacturing about 20,000 pounds of reworked butter. After the butter was removed from the churn the churn was about one-third full of water. Sullivan then went to the cooler and took 13 samples of butter. The record does not disclose from what receptacles these samples were taken, nor does it show whether or not it was reworked butter. The analyses showed that three of the 13 samples contained 80 percent or more of butter fat, and that 10 samples contained less than 80 percent butter fat. At the time of this inspection there were on the premises 6,667 pounds of reworked butter which had been rechurned on January 24, 25, and 26, 1937.

21. Following the inspection on January 26, 1937, Agent Krueger submitted a report to the Commissioner of Internal Revenue in which he recommended that the following taxes be assessed: Manufacturer's special tax for the period January 1 to June 30, 1937, $300; penalty for failure to pay such

tax $30; and stamp tax on 6,667 pounds of adulterated butter $666.70, making a total assessment of $996.70.

22. The Commissioner, upon the evidence before him, approved the recommendations of Krueger and the taxes recommended in the preceding findings were assessed against plaintiff on the April 1937 list. After notice and demand from the Collector of Internal Revenue the plaintiff made payments before the filing of the petition in case No. 44008 as follows:

September 18, 1937	$50
October 5, 1937	50
November 12, 1937	50

23. March 22, 1938, plaintiff filed a claim for refund (plaintiff's exhibit 2) in the amount of $150, and in support thereof gave as reasons that it was not a manufacturer of adulterated butter within the meaning of the statute, and that none of the butter manufactured during the period January 1 to June 30, 1937, was adulterated butter.

May 17, 1938, the Commissioner of Internal Revenue advised plaintiff by letter (plaintiff's exhibit 4) of his purpose to reject the claim. This letter is in substance the same as the Commissioner's letter rejecting the claim for refund on the June 1936 assessment, referred to in finding 17. The claim was rejected on a schedule dated May 31, 1938.

24. The assessment of taxes against plaintiff on the April 1937 list together with the further assessment on the June 1940 list, covering penalty and interest, has been completely satisfied by payments made by plaintiff.

25. June 6, 1942, plaintiff filed a claim for refund (exhibit E to the stipulation) in the amount of $1,044.12, and in support thereof gave as reasons that none of the butter manufactured by plaintiff was adulterated, that it was not the manufacturer of butter purchased and repacked by it, and that it did not adulterate such butter in repacking.

September 5, 1942, the Commissioner of Internal Revenue rejected the claim and his letter of rejection is in substance the same as his letter referred to in finding 17.

26. During the taxable periods involved plaintiff was engaged in the business of manufacturing adulterated butter. The proof shows that during the taxable periods involved

plaintiff manufactured adulterated butter within the meaning of the taxing statute from the butter which it purchased from wholesalers and rechurned by adding water to the butter in the rechurning process. Plaintiff's proof is not sufficient to show that the amount or number of pounds of butter taxed as adulterated during the taxable periods was erroneous, or what portion, if any, of the butter so taxed was not adulterated within the meaning of the statute defining adulterated butter.

DEFENDANT'S COUNTERCLAIM

27. At the time the petition in cause No. 44008 was filed, the plaintiff had paid only $300 on the assessment of June, 1936, and $150 on the assessment of April, 1937. At a hearing held at Chicago, Illinois, on July 22, 1940, counsel for the parties stipulated, among other things, that "No payments other than those above set forth have been made by plaintiff on the assessments shown and the balance of the said assessments is at the present time outstanding, not having been abated by the Commissioner of Internal Revenue."

Following the first closing of proof, the defendant by leave of the Court filed a counterclaim praying judgment against the plaintiff for the difference between the aggregate of the assessments and the payments made thereon. April 21, 1942, plaintiff filed an answer to defendant's counterclaim, alleging that further payments had been made on account of the assessments. Thereafter, following receipt of information from the Collector of Internal Revenue, a stipulation was entered into between the parties which discloses that there was then due and owing the Government under the Commissioner's assessment of June, 1936, a balance of $1,960.63 together with interest in amount of $2,439.14, or an aggregate of $4,399.77. It has also been stipulated and agreed that the assessment of April 1937 has been satisfied in full.

Plaintiff filed petition No. 45764 on October 10, 1942.

28. When the cases were submitted to the court for decision, plaintiff stated that further payments had been made on account of the 1936 assessment and the interest due to the Collector since the last stipulation above referred to in

finding 26, and that evidence of the amount of such payments and the balance remaining due on account of tax and interest would be submitted to the defendant and the court for the purpose of judgment as soon as the issues presented by the record had been decided.

The court decided that the plaintiff was not entitled to recover and, further, that the defendant was entitled to recover on its counterclaim the amount of any unpaid tax and interest on the June 1936 assessment.

LITTLETON, *Judge*, delivered the opinion of the court.

The facts which are pertinent and necessary to the decision of the questions presented are set forth in the findings. The issues have already been stated hereinbefore. It is not deemed necessary to discuss the conflicting testimony of plaintiff's and defendant's witnesses. It is sufficient here to say that the butter involved and which the defendant taxed as adulterated is butter which had been first manufactured by others and purchased by plaintiff wholesale and subsequently rechurned or reworked in churns. The evidence of plaintiff and that of defendant is conflicting on the question of whether plaintiff manufactured adulterated butter within the meaning of Sections 2320 and 2322, Internal Revenue Code, but the greater weight of the evidence of record establishes to our entire satisfaction that plaintiff did manufacture adulterated butter during the taxable periods involved and that it engaged in so doing as a business by adding water to the butter in the process of rechurning or reworking the butter in churns.

Everyone agrees that the rechurning or reworking of butter in churns without the placing of water in the churns in the rechurning or reworking process will not increase the moisture content or decrease the milk fat content of the butter per pound, but, on the contrary, such rechurning or reworking of butter without adding water will tend to decrease the moisture and increase the butter fat content per pound. Plaintiff made no contention and introduced no proof to show that butter purchased from wholesalers contained excess moisture or was deficient in milk fat before it was rechurned by plaintiff. In view of this and in view of the greater

weight of the evidence which satisfactorily shows that plaintiff rechurned the butter in warm water we must hold that plaintiff adulterated the butter because the process used by plaintiff naturally would have that effect, unless the butter was reworked after it was rechurned, which it was not. In view of the evidence of record the Commissioner's finding that plaintiff adulterated the butter is sufficient to rebut any presumption that the butter may have been adulterated by the wholesalers from whom plaintiff purchased it.

The Commissioner of Internal Revenue held upon the evidence before him that plaintiff was a manufacturer of adulterated butter as a business and also determined upon the evidence before him the number of pounds of adulterated butter that plaintiff had produced, and assessed the taxes and penalties accordingly. These determinations and assessments are *prima facie* correct. Plaintiff has the burden in a suit for refund of showing that such determinations and assessments are erroneous or illegal. We are of opinion that plaintiff has not sustained that burden in these cases. We think the record as a whole supports rather than disproves the determinations and assessments of the Commissioner and the amounts thereof.

Plaintiff further objects to the amount of the taxes determined by the Commissioner to be due and claims that we should reduce the amount because only a portion of the butter taxed was sampled and tested as provided in Articles 106 and 107 of Regulations No. 9. We find nothing in the statute taxing adulterated butter or in the regulations relied upon that prohibits the Commissioner from determining and taxing the amount of adulterated butter manufactured on evidence other than by taking samples and making formal tests. The regulations are administrative and procedural and they do not, even if they could, exclude the consideration and use in a particular case of credible evidence of the making of adulterated butter other than evidence obtained solely by taking samples from the various lots of butter taxed. We think he had such evidence in these cases. In this respect the regulations concerning the taking of samples should be regarded as directory rather than mandatory. Cf. *United States* v. *Michel*, 282 U. S. 656,660. The Commissioner had

and this court has substantial evidence which the Commissioner had obtained from officers of plaintiff. He used that evidence with other evidence in determining the number of pounds of butter which he taxed as having been adulterated. Plaintiff's proof submitted here is not, in our opinion, sufficient to disprove the correctness of the Commissioner's determinations and assessments. Plaintiff is therefore not entitled to recover and the petitions must be dismissed.

Defendant is entitled to judgment on its counterclaim for such portion of the taxes assessed and interest due thereon as have not been paid. Judgment for such amount, if any, will be entered upon the filing by the parties of a statement or stipulation showing the exact amount of such unpaid taxes and interest. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the above opinion, a stipulation was filed by the parties in which it was stated that—

> The parties to the above causes by their respective counsel hereby stipulate and agree that the amount of judgment to be entered on defendant's counterclaim under the decision of the Court is as follows:
>
> | | |
> |---|---|
> | Balance of tax | $1, 085. 63 |
> | Five percent penalty | 424. 00 |
> | Accrued interest to January 25, 1944 | 2, 599. 07 |
> | Total | 4, 108. 70 |
>
> It is hereby further stipulated and agreed that in addition to the above amounts, the judgment of the Court should include interest on the principal sum of $1,085.63 from January 25, 1944, to date of payment.

On defendant's motion for entry of judgment it was ordered June 5, 1944, that judgment for the defendant be entered in the sum of $4,108.70, together with interest on the principal sum of $1,085.63 from January 25, 1944, until paid, as provided by law.

ARTHUR DEWITT JANES v. THE UNITED STATES

[No. 45938. Decided April 3, 1944. Plaintiff's motion for new trial overruled October 2, 1944]*

On Defendant's Demurrer

Statute of limitations.—It is *held* that plaintiff's claim is barred by the statute of limitations, U. S. Code, Title 28, section 262, either under the limitation of six years after the cause of action first accrues or under the alternative limitation of three years after the removal of the disability in case of a disability in existence when the cause of action accrued.

Mr. Arthur DeWitt Janes, pro se.

Miss Mary K. Fagan, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The facts sufficiently appear from the opinion of the court.

MADDEN, *Judge*, delivered the opinion of the court:

The Government demurs to the plaintiff's petition. The petition alleges that the plaintiff enlisted in the Navy in 1917 and was released from active duty in 1919; that on or about June 15, 1925, George A. Janes, the plaintiff's brother, and one McCreight applied to the Veterans' Facility at Helena, Montana, for transportation to carry the plaintiff to the Veterans' Facility at Sheridan, Wyoming, for hospitalization; that on June 28, 1925, the plaintiff was placed in the Sheridan institution and $245.00, taken from his person, was put into the possession of the United States Treasury Paying Agent at the institution, and has never been returned to the plaintiff.

The petition further alleges that George A. Janes attempted to file a complaint in a State court of Montana, alleging that the plaintiff was insane and was entitled to a pension of $80 a month from the Government; that the court, acting ex parte, "made the necessary order" (apparently appointing George A. Janes as guardian of the plaintiff); that the Veterans' Administration gave effect to the court's

*Plaintiff's petition for writ of certiorari pending.

order and the guardian's will; that the plaintiff was restrained in the Veterans' Facility at Sheridan from June 28, 1925, to December 28, 1935, by force; that he was compelled to labor almost continuously from five o'clock in the morning until nine o'clock at night; that he has not been compensated for that labor; and that it was worth $38,400.

The petition further alleges that he was permitted to leave the Veterans' Facility at Sheridan on December 28, 1935; that, after spending some time in California, he returned to Montana; that the Montana court, on September 16, 1937, upon his motion, set aside the 1925 proceedings and order relating to the plaintiff, and determined that they were null and void because the court had never had jurisdiction of the plaintiff; that the plaintiff, in a suit in the District Court of the United States for the District of Montana, recovered a judgment against the administrator of the estate of his brother, George A. Janes, apparently for the pension money paid to George A. Janes as guardian; and that the judgment has not been satisfied.

In addition to the sums of $245 and $38,400 named above, the plaintiff seeks recovery of $32,400 as the value of his "future employability" from the date of his release from Sheridan until he shall reach the age of 65.

The Government's first ground of demurrer is that the plaintiff's claim, even if it were otherwise valid, is barred by the statute of limitations.

Section 156 of the Judicial Code, 28 U. S. C. 262, provides generally that suits against the Government must be brought within six years from the date when the cause of action first accrues, but further provides that as to persons under disability, including persons of unsound mind, such persons may, whether the normal six-year period has run or not, bring suit within three years after their disabilities have ceased.

All of the acts of the Government complained of in this suit were done on or before December 28, 1935. If, therefore, the normal period of six years is applied, the plaintiff's right to sue was barred in December 1941. His petition in this suit was filed in 1943. If, because the plaintiff was under guardianship as a person of unsound mind,

we apply the special provision of the statute relating to such persons, it does not help the plaintiff, since that adjudication of guardianship was revoked on September 16, 1937, hence the three-year period permitted after the disability ceased would have expired before the normal six-year period had run. The plaintiff is, therefore, barred by lapse of time from maintaining his suit.

The Government asserts additional grounds for its demurrer, but it is not necessary to consider them because of the plain provisions of the statute of limitations.

The defendant's demurrer will be sustained, and the plaintiff's petition dismissed. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

GLOBE INDEMNITY COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44900. Decided May 1, 1944. Plaintiff's motion for new trial overruled October 2, 1944]*

On the Proofs

Government contract; changes ordered by the contracting officer not approved by the head of department as required by articles 3 and 4 of the standard construction contract.—Where, in connection with a Government construction contract, the contractor did additional work such as was contemplated by article 4 of the standard Government construction contract, providing for changes in the plans and specifications when the subsurface conditions encountered differed from conditions indicated by the specifications; and where the change in question was one ordered by the "contracting officer," as that term is defined in the contract, but was not approved in writing by the head of the department, or his representative, as required by article 3 and article 4 of the contract; plaintiff is not entitled to recover. See *Plumley* v. *United States*, 226 U. S. 545, 547; *United States* v. *McShain*, 308 U. S. 512, 620; *Wisconsin Bridge & Iron Co.* v. *United States*, 97 C. Cls. 165; *Arnold M. Diamond* v. *United States*, 98 C. Cls. 428.

*Plaintiff's petition for writ of certiorari denied March 5, 1945.

Reporter's Statement of the Case

Same; surety may not recover where there is no indebtedness to contractor by the Government.—Where it is held that the defendant is not indebted to the contractor; the contractor's surety is not entitled to recover.

The Reporter's statement of the case:

Mr. P. J. J. Nicolaides for the plaintiff. *Mr. William F. Kelly* was on the briefs.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Messrs. S. R. Gamer* and *L. R. Mehlinger* were on the briefs.

The court made special findings of fact as follows:

1. The plaintiff, Globe Indemnity Company, is a corporation organized and existing under the laws of the State of New York, and engaged in the bonding and insurance business, with its principal office in New York City.

2. On May 12, 1933, Peter and A. J. Ellis, Inc., a corporation, hereinafter referred to as the contractor, entered into a contract with the United States to furnish all labor and materials and perform all work required for the construction of the west extension to the steam distribution system of the central heating plant for public buildings in Washington, D. C., within 275 calendar days after the date of receipt of notice to proceed, for the consideration of $299,400 plus the sum of $44,289.71 for certain agreed extra work, in strict accordance with specifications and drawings, which were made a part of the contract.

3. On May 16, 1933, the contractor, as principal, and the Globe Indemnity Company, as surety, executed a standard Government form of performance bond to the United States in the penal sum of $150,000, whereby they jointly and severally bound themselves to secure the performance of the contract and also to secure payment of labor and materials. The bond was accepted and approved by the defendant on April 16, 1935.

4. The contract was executed on behalf of the Government by L. W. Robert, Jr., Assistant Secretary of the Treasury.

Article 18 of the contract read as follows:

> Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.
>
> (b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Paragraph 3 of the specifications read as follows:

> The term "construction engineer" shall be understood to refer to the authorized representative of the supervising architect of the Treasury Department.

Article 36 of the specifications read as follows:

> The supervising architect's representative, under whose direction the work will be installed, shall be consulted relative to the time and manner of performing the work so as to cause the least interference with other contracts, and the contractor shall keep a sufficient quantity and force of labor at the job to perform the work expeditiously and insure its completion by the date named.

Neal A. Melick was the Government Construction Field Engineer in charge of the execution of the contract. At the time of the hearing he was the Supervising Engineer in charge of all buildings and works in the Public Buildings Administration. Herman J. Bounds, his subordinate, was a field engineer in charge of all field construction under the government administration and was the government construction engineer on the job. James A. Wetmore, Supervising Architect of the Treasury Department, was Mr. Melick's superior part of the time, and Admiral J. C. Peoples, head of the Procurement Division, his superior part of the time. Louis A. Simon was Supervising Architect of Public Buildings from 1934, and on February 27, 1936, was Assistant Director of Procurement. The contractor was advised by the Procurement Division to conduct all business and correspondence concerning the contract through Mr. Melick's office, and Mr. Melick informed the contractor that Mr. Bounds was in charge of the work.

5. In general, the west extension to the steam distribution system consisted of three steam lines, each of which was connected to the west end of the main distribution system. The three steam distribution lines ran from 18th and C Streets NW, to the Interior Building and the State, War, and Navy Buildings, via 18th Street and New York Avenue; from 19th and C Streets NW, to the Munitions Building and the Navy Building; and from 19th and C Streets NW., westwardly along C Street to the Naval Hospital. Although some tunnel work was involved in the contract, the major portion of the work, and that which is involved in the present issue, comprised open trench work. Approximately 75% of the construction work was in close proximity to sewers, gas, water, and electric mains, and either adjacent to or under paved streets and sidewalks.

6. Pertinent provisions of the specifications are as follows:

> 13. EXAMINATION OF ROUTE.—Bidders should fully inform themselves regarding the conditions to be met along the route on which the work will be done, and in the buildings to be served by the system. Failure to take this precaution will not relieve the successful bidder from furnishing all material and labor necessary to complete the contract without additional cost to the Government.
>
> * * * * *
>
> 25. Everything necessary for the completion and successful operation of the work, whether or not herein definitely specified or indicated on the drawings, shall be furnished and installed as well and as faithfully as if so specified or so indicated.
>
> * * * * *
>
> 67. RISKS OF THE WORK.—The contractor shall carry on the work at his own risk until it is fully completed and is accepted by the Government. The Government will vacate the premises to which it holds title during the life of the contract hereunder. The contractor shall be responsible for the proper care and protection of the premises, and for all damage to persons or property that occurs as a result of his fault or negligence.
>
> * * * * *
>
> 104. BRACING AND SHEETING.—The sides of excavations shall be temporarily supported and maintained secure

until permanent support is provided. But wherever the removal of temporary sheeting would permit a settlement of the adjacent soil, with the possibility of affecting the stability of existing structures, then the contractor, instead of installing temporary sheeting, shall install sheet steel piling which shall be left in place in the ground, or he shall underpin the existing foundations with masonry. For example, sheet steel piling will be required at 18th and D Streets and at the Munitions Building, and elsewhere if it be so directed or necessary to maintain the safety of the work and the adjoining property.

* * * * *

110. PLACING.—Earth backfill shall be placed in horizontal layers, not over 8 inches in depth, each thoroughly tamped, packed, or puddled, as directed, so that no settlement shall occur. All temporary planking, timbering, sheeting, and other supports shall be removed as the backfill is placed. Great care shall be exercised during the backfilling to avoid disturbance or damage to any concrete or other work.

7. In addition to the sheet steel piling required by section 104 of the specifications at 18th and D Streets and at the Munitions building, the drawings did show at certain other localities where permanent sheet steel piling was required. Except at these places, the drawings and specifications indicated that the soil conditions were such that the temporary planking, timber, sheeting, and other supports were to be removed after the backfill had been placed.

8. Before submitting a bid, the contractor made an examination of the route, which in some places was in the sidewalk and other places in the bed of the street. This inspection was visual.

9. In accordance with Articles 104 and 110 of the specifications quoted above the contractor planned, in connection with the open trench work, to use temporary planking, timbering and sheeting which would be removed as the backfill was placed, and to reuse the planking, timbering, and sheeting as the trench work progressed.

10. Soon after beginning the work under the contract it was discovered that the soil was soft, flowing silt. At the

localities where these conditions existed it was impossible to remove the temporary timber, sheeting and shoring during the placing of the backfill without jeopardizing the safety of adjacent structures, streets, buildings, and the various utility lines and services.

When this character of soil was discovered, the contractor, through A. J. Ellis, conferred with Melick and Bounds and other Government engineers regarding the situation. In response to a request of the contractor for information as to what should be done, Bounds told Ellis that it was his opinion that the temporary timber sheeting and lumber should be left in place and suggested such procedure.

11. At a conference on this matter in Melick's office, Bounds told the contractor to complete the work and see how much lumber had to be left in place and then to make up a proposal for the added cost of the same.

Such procedure was followed and on July 17, 1933, the contractor submitted a written proposal covering the extra cost of the temporary timber sheeting and bracing to be left in the trenches. In the letter to the Supervising Architect transmitting the breakdown of the proposal the contractor advised the Supervising Architect as follows:

> In order to prevent a general disruption of adjacent underground utilities, the cracking up and subsequent settling of the surrounding street and sidewalk surfaces, the movement and possible failure of building structures in the immediate vicinity of the steam tunnel trench location due to the soft and unstable nature of the earth embraced in our contract we propose to allow all of our temporary bracing lumber to remain permanently shoring the sides of the excavation for the lump sum price of $19,565.00 as an added expense to our contract with no change contemplated in the stipulated contract time for completion.
>
> For your information we inclose a breakdown indicating the manner in which we have arrived at the figure quoted above.

On August 4, 1933 defendant's Construction Engineer transmitted the contractor's proposal to the Supervising Architect, advising him as follows:

AUGUST 4, 1933.

SUPERVISING ARCHITECT,
TREASURY DEPARTMENT,
Washington, D. C.

SIR:

Reference is made to the contract of Peter and A. J. Ellis, Inc., for the construction of the West Extension to the Steam Distribution System of the Central Heating Plant for Public Buildings, Washington, D. C.

There is transmitted herewith a proposal in the amount of $19,565.00 as an addition to their contract for leaving the temporary timber sheeting and bracing in the tunnel trenches to prevent disruption to adjacent underground utilities, cracking up and settlement of streets and sidewalks, the movement and possible failure of building structures immediately adjacent to the steam tunnel location, due to the soft and unstable nature of the earth within the route of the steam tunnels.

There is also transmitted herewith a letter dated August 2nd, 1933, from the United Engineers and Constructors, Designing Engineers, recommending that the sheeting and bracing lumber be left in place rather than remove as required by the specifications.

In preparing plans and specifications for the West Extension of the steam distribution system no consideration was given to the character of the soil to be encountered. The greater part of the tunnel and conduit to be constructed under this contract is located so close to paved streets, buildings, sewers, gas, water, and electric mains and building foundations, with the underground soil conditions revealed by the progress of the work to be of such flowing nature that the sheeting used to support the sidewalls of the excavation during construction cannot be pulled or moved without great risk of damage to such improvements.

Experience recently encountered in other trench excavations in nearby areas has proven that the removal of any temporary sheeting and bracing, even with back fill work performed in the highest degree of excellence, subjects adjacent structures to damage.

Paragraph 110 of the contract specifications required that all wood sheeting shall be removed as back fill is placed. It states in paragraph 104 that wherever permanent shoring is necessary for maintaining the safety of the property steel sheet piling shall be used and left in place. However, this cannot be interpreted to extend

indefinitely to cover all conditions by reason of definite locations being fixed on the drawings.

An investigation was made by this office of the breakdown furnished by the contractors and it was found to be approximately correct. Notwithstanding the statements made in the United Engineers' letter, the proposal was found to be reasonable in amount and it is recommended that the proposal be accepted, as the work is absolutely necessary in order to avoid wrecking buildings in the vicinity of the tunnel and trenches as well as the public utilities property.

Respectfully,

Construction Engineer.

Enclosure. HJB/FBW

12. On January 2, 1934, the contractor submitted a revised written proposal to the Supervising Architect in the sum of $19,439.25, which represented its estimate of the difference in cost between the expense of pulling out and salvaging value, if any, of the timber sheeting and bracing to be left in the trenches in excess of the cost of piling. This proposal was as follows:

We have had under consideration your request for an amendment of our proposal of July 17, 1933, for reimbursement in the sum of $19,565.00 on account of the necessity of leaving all wood sheeting and bracing in the trenches for the steam tunnels on the above captioned contract, on the basis of a "Reasonable bid for difference in cost between expense of pulling out and salvaging value if in excess of cost of piling," and wish to advise you as follows:

We have compiled the final figures for the total amount of lumber used and left in place and we have found this to be 655,000 feet instead of 569,410 feet as quoted in our earlier proposal.

The necessity of leaving this lumber in place has been established beyond question and the quantity named has been checked by you.

If the specification had stated that trench bracing and sheeting would be required to be left in place we would have included in our bid cost figures on the following basis:

(a) Lumber in place, 655 M @ 40.00.............. $26, 200. 00

but as paragraph No. 110 of the specifications points out without qualification that, "All temporary planking, timbering, sheeting, and other supports shall be removed

as the backfill is placed" we were specifically advised that the Government was assured that the soil was of such a character that the function of this paragraph requirement could be safely carried out we figured our bid on the following basis:

(b) Lumber to be used 4 times, 164 M @ 40.00	$6,560.00
Plus replacement of loss for each use, 23 M @ 40.00	920.00
Plus cost of removal, 655 M @ 1.60	1,048.00
	8,528.00
As the performance of the requirement of paragraph No. 110 has not been practicable and we have been required by unknown conditions to use new lumber throughout and leave it in place the net increase in our cost has been (a) minus (b) or	$17,672.00
The overhead charges for both operations offset each other but we feel that on this additional expenditure we are entitled to a profit charge of 10%	1,767.20
making a total	19,439.25

in which amount we respectfully claim reimbursement.

The unit price represented above is $29.75 per M and in substantiation of the reasonableness of this unit price we are attaching a copy of our contract with the District of Columbia for the installation of a 48-inch water main, in which there is set forth in paragraph No. 57 a specific allowance of $35.00 per M for all lumber left in place, when so directed, and this price is over and above all costs included in the bid for temporary timbering. This particular reference is a standard clause in all of the contracts of the District of Columbia for work of similar nature.

We respectfully submit the claim of $19,439.20 noted above which represents a compliance with the terms of your request for a "reasonable bid for difference in cost between expense of pulling out and salvage value if in excess of cost of piling."

We are offering this lumber to you at a rate of $29.75 per M, whereas the salvage value to us, as it is capable of being used in other work of similar character, is $30.00 per M or $40.00 new less $10.00 for one use, and it has a potential salvage value of $35.00 per M in contracts with the District of Columbia.

13. On January 3, 1934, defendant's construction engineer Melick transmitted the revised proposal to the Public Works Branch, Procurement Division of the Treasury Department, with the written statement that the proposal "represents a

fair and reasonable claim," and recommended that it be favorably considered.

On January 23, 1934, Melick further advised the Public Works Branch of the Procurement Division that no express orders were issued to the contractor to leave the sheeting in place, but by common agreement of the engineers associated with the work it was considered not only advisable but necessary to leave the sheeting in place to avoid jeopardizing the safety of adjacent structures, streets and utility lines.

14. The contractor's proposals of the cost of leaving the temporary timber sheeting in place were submitted to and considered by the Board of Awards, commonly called the Board of Changes, and on May 2, 1934, the contractor's proposal was rejected by a letter from the Director of Procurement, Admiral Peoples, reading as follows:

> In connection with your contract for west extension of steam distribution system for Federal Buildings in this city, reference is made to your request for compensation for wood sheeting and bracing left in place in the trenches for the steam tunnels when the backfill was made.
>
> This question has formed the subject of much correspondence and a number of conferences, and on January 2, 1934, you submitted a proposal revising your proposal of July 17, 1933 ($19,565.00) to $19,439.25, which eliminated overhead charges but includes the usual 10% profit.
>
> A thorough review of the data in this case indicates that the extra you are claiming is not legally allowable and your proposal above described is therefore rejected.
>
> While the review of the case indicates, as stated above, that there is no tenable legal ground for the claim, if you still believe that it presents equitable considerations in your favor you have a right to present the claim direct to the Comptroller General.

The contractor did not at any time request a change under the contract or that it be given a written order covering the cost of leaving the temporary timber sheeting and bracing in place. Moreover, the contractor did not appeal to the head of the department from the action of the contracting officer denying its claim for reimbursement of the estimate of the cost of leaving the temporary sheeting and bracing in place.

15. Pertinent provisions of the contract relative to changes, extras, care of work, and disputes concerning questions of fact, read as follows:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment, the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

*   *   *   *   *

ARTICLE 10. *Permits and care of work.*—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

* * * * *

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

In addition, the specifications provided as to interpretations the following:

6. INTERPRETATIONS.—The decision of the contracting officer, or his authorized representative, as to the proper interpretation of the drawings and specification, shall be final. The supervising architect is the duly authorized representative of the contracting officer.

16. The work was completed by the contractor and the same was accepted by the defendant on April 16, 1935. On this date the Director of Procurement approved the final voucher and authorized the payment of the balance of $37,698.97, set forth therein.

On April 20, 1935, the amount claimed in the final voucher was paid by a check drawn in favor of the contractor. The check was endorsed by the contractor without any protest and no reservation was made on the final voucher with respect to the extra cost of leaving the temporary timber sheeting in place.

17. On August 6, 1935 the contractor submitted a claim for consideration to the General Accounting Office. Thereafter, on February 27, 1936, L. A. Simon, Assistant Director

of Procurement, made a report thereon to the General Accounting Office, stating in part as follows:

> In summary, it is concluded that there was no requirement in the contract which provided the methods to be followed under the unexpected conditions actually encountered. On the other hand, paragraph 110 of the specification specifically required that temporary sheeting be removed. A change in the requirements was plainly necessary if the temporary sheeting was to be left in the trenches.
>
> Whether the change was one to be made under Article 3 or under Article 4 of the contract depends upon whether the nature of the soil to be expected was 'indicated' in paragraph 110 of the specification, since it is clear that the drawings contained no representations in that regard. It is believed that paragraph 110 did clearly indicate a form type of soil which would permit the removal of temporary sheeting. In fact, the direction to withdraw the temporary sheeting was more definite than a report on soil conditions; for if soil data alone had been furnished, each bidder would have been required to determine for himself whether removal of the sheeting would be possible. But if the nature of the soil was not 'indicated' within the meaning of Article 4, it nevertheless remains that a change in the contract requirements was necessary, and to effect the change resort to Article 3 of the contract would have been appropriate.
>
> * * * * *
>
> Attention is invited to the fact that the claim states in several places that temporary sheeting was left in the trenches for the support of adjacent buildings. The Construction Engineer, now the Supervising Engineer, has stated that no temporary sheeting was in fact left in the trenches for this purpose, since adjacent buildings generally rested on piles and did not need support. Thus, the claim may be considered without reference to the possibility that the government was entitled to a credit for failure to install sheet steel piling at such points in accordance with paragraph 104 of the specification.
>
> * * * * *
>
> The serious legal objection to the claim arises by reason of the fact that the contractor was not ordered to

leave the temporary sheeting in the trenches under either Article 3 or Article 4 of the contract. It may be asserted, however, that an order would have been given had an attempt been made to remove it, and the contractor's procedure was the only feasible solution of an unavoidable problem. The Construction Engineer was fully cognizant of such procedure, as was this office, and there was no intimation during the time when the work was being performed that payment would not be made in accordance with the proposals under consideration. The work was necessary, and the proposal of July 17, 1933, slightly revised, would have been accepted in advance of the work but for doubts then entertained as to the scope of the contract requirement. The government has received the full value of the sheeting left in the trenches, and, since the claim has been carefully checked and is believed to be reasonable in amount, it is recommended for such equitable consideration as the Comptroller General may give it.

The claim was denied by the General Accounting Office on April 23, 1937. On December 13, 1938, a request for reconsideration of the claim was denied by the General Accounting Office.

18. Numerous creditors who had furnished labor and materials in the performance of the contract were not paid by the contractor and the plaintiff was compelled to accept liability for and pay to these creditors the sum of $60,401.80 in settlement of their claims for labor and materials in accordance with its obligation as surety under its bond to the United States.

The plaintiff also incurred other expenses amounting to $2,519.90, including attorneys' fees and court costs in connection with the payment and settlement of the creditors' claims.

On account of reimbursement for the claims paid, plaintiff has received the sum of $35,068.01 from the proceeds of the final payment check of $37,698.97 which defendant paid the contractor on its final voucher in settlement of the amount due the contractor under the contract, and $8,648.43 from the receivership of the Standard Pipe & Fitting Company, one of the subcontractors of the contractor. The plaintiff has received a total of $43,716.44 of the amount it has been

required to pay as surety, resulting in a net loss of $19,204.56, which amount it is now claiming.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is another case where the defendant has received the benefit of work done by the contractor on the order of defendant's representatives in charge of the work, but refuses to pay for it because the contract requirements were not complied with. It is a case of hardship, but one in which this court is powerless to give relief because of the contractor's failure to insist on compliance with the plain provisions of the contract relative to changes.

It is a suit by a surety on the contractor's bond, which paid amounts due by the contractor on the contract. The surety claims the defendant is indebted to the contractor, and that it is subrogated to its right to demand payment of the indebtedness.

It is not entitled to recover, of course, if the defendant is not indebted in fact to the contractor. We are obliged to hold that it is not.

The contractor Peter and A. J. Ellis, Inc., had a contract to construct the west extension of the steam distribution system of the central heating plant in Washington, D. C. Most of it was open trench work in and adjacent to streets and sidewalks in the city and in close proximity to buildings, sewers, gas, water, and electric mains.

As the trench was dug it was necessary to shore up the sides with temporary planking, timbering, sheeting, and other supports. Section 110 of the specifications required that earth backfilling be placed behind the shoring and, after the earth had been thoroughly tamped and packed to prevent settlement, for the removal of the temporary shoring. It was discovered, however, that the earth was of so unstable a character that settlement would occur if the temporary shoring were removed.

The contractor called this to the attention of the construction engineer. After several conferences this officer told the

contractor to complete the work, when it could be ascertained how much of the temporary shoring it had been necessary to leave in place and how much additional compensation the contractor was entitled to on account thereof. The contractor agreed and did the work. After it had been completed it presented its bill for something over nineteen thousand dollars.

The amount claimed is not in dispute, but the defendant says the contractor is not entitled to be paid because the contract requirement for securing the written approval of the head of the department was not complied with.

The additional work done was such as was contemplated by article 4 of the contract. That article provided for changes in the plans and specifications where the subsurface conditions encountered differed from those indicated by the specifications. When the specifications were drawn it was thought the condition of the soil was such that the temporary shoring could be removed. As the work progressed it was found it could not be.

In such contingency article 4 provides for the procedure to be followed. It is that the contracting officer, "with the written approval of the head of the department or his representative" shall make the necessary changes in the specifications.

The specifications in this case were changed by Mr. Melick, the construction engineer, and not by L. W. Robert, Jr., Assistant Secretary of the Treasury, who was the contracting officer. Melick's immediate superior was, first, James W. Wetmore, the supervising architect, and, later, Admiral Peoples, the head of the Procurement Division of the Treasury Department. Robert, in turn, was the superior of the supervising architect and of the head of the Procurement Division. Herman J. Bounds was Melick's subordinate, in immediate charge of the work.

The change was not ordered by the contracting officer; it was ordered by Bounds, with the concurrence of the construction engineer, at a conference in the latter's office. However, it appears from a letter from the Assistant Director of Procurement to the Comptroller General that the head of the Procurement Division was fully cognizant of the order

given. Whether or not the contracting officer was cognizant of it does not appear.

However, article 18 (b) of the contract provides that "the term 'contracting officer' as used herein shall include his duly appointed successor or his duly authorized representative." From the conduct of the parties in this case and from our knowledge of the procedure in the Treasury Department, of which we may take judicial notice, we may assume that the Director of the Procurement Division was the authorized representative of the contracting officer. (When the contractor presented its claim for payment for this additional work, this claim was acted upon not by the contracting officer in person but by Admiral Peoples, the head of the Procurement Division.) Under the circumstances of this case, we are of the opinion that the change was one ordered by the "contracting officer" as that term is defined in the contract.

However, article 4 provides that the change must be ordered by the contracting officer "with the written approval of the head of the department or his representative." The change certainly did not have the approval in writing of the head of the department or his representative, and, so far as it appears from the proof, the head of the department or his representative had no knowledge of the change.

Article 4 should be read in connection with article 3 of the contract. *United States* v. *Rice, et al.*, 317 U. S. 61. Article 3 provides for changes in the plans and specifications generally. It provides that "no change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered [by the contracting officer] unless approved in writing by the head of the department or his duly authorized representative." This article gives the contracting officer the right to make changes involving less than $500, but permits the making of a change involving a greater amount only with the approval in writing of the head of the department or his duly authorized representative. This change involved more than $19,000 and did not have the written approval of the head of the department.

It is seen, therefore, that there has been a complete failure to comply with the provisions of article 4 and of article 3. Both this court and the Supreme Court have held

that there can be no recovery for additional work performed where there has been a failure to comply with these provisions of the contract, or a similar provision contained in Article 5. *Plumley* v. *United States*, 226 U. S. 545, 547; *United States* v. *McShain*, 308 U. S. 512, 620; *Wisconsin Bridge & Iron Co.* v. *United States*, 97 C. Cls. 165; *Arnold M. Diamond* v. *United States*, 98 C. Cls. 428.

It is true articles 3 and 4 were incorporated in the contract by the defendant for its benefit and that defendant's representatives ordered the change without complying with them. Had defendant's construction engineer and supervising architect had the authority to waive these provisions, we would hold that they had been waived and that the contractor was entitled to recover notwithstanding noncompliance with them; but these representatives did not have the authority to waive them and the contract gave all parties notice that they did not have. Only the head of the department or his duly authorized representative could waive them. The contractor relied on the unauthorized promises of the construction engineer at its peril.

The head of the department, or his duly authorized agent, of course, could have ratified these unauthorized acts, and in our opinion should have done so, since the work was necessary and for defendant's benefit, but he did not do so, and we are powerless to do it for him.

From this case two lessons are to be drawn: (1) contracting officers and heads of departments should exercise the great powers conferred on them by these contracts to do equity; they should not feel under obligation to take advantage of technicalities, where to do so would defeat justice; (2) contractors must study their contracts and insist on compliance with their terms; before relying on any promise they should ascertain that it is made by a person having authority to make it.

We are obliged to hold that the defendant is not indebted to the contractor and, therefore, that the contractor's surety is not entitled to recover. However, as we stated in the beginning, this is a case of great hardship and one that com-

mends itself to the consideration of Congress. Plaintiff's petition will be dismissed. It is so ordered.

WHALEY, *Chief Justice*, and BOOTH, *Chief Justice* (retired), recalled, concur.

MADDEN, *Judge*, concurring in the result.

I agree with the majority of the court that the plaintiff is not entitled to recover. I would, however, base the decision upon a different ground. The majority opinion indicates that, though the denial of relief to the plaintiff works a hardship, the court is powerless to give relief because of the plaintiff's failure to comply with certain technical requirements of the contract. If I agreed with the majority as to the hardship of the result and as to the only reasons for it being the technical reasons given, I would think that the decision should be for the plaintiff. Situations in which a court is obliged to make a decision which it regards as harsh and unjust should be rare. See *Armstrong* v. *United States*, 98 C. Cls. 519. I think this is not one of those situations.

The contractor encountered the problem of how to keep the earth from caving in while back filling the trenches. After consultation with the Government's supervisors on the job it was decided that the way to do it was to leave the wood sheeting in place. The contractor was subsequently told to keep a record of the added expense of doing so, and present a proposal for additional compensation. When it presented this proposal, the Government's supervisors of the work recommended that it be accepted, but the Director of Procurement, who was acting for the contracting officer, rejected the proposal after consideration which included the decision of a Board of Awards. His ground of rejection seems to have been that the contract required the contractor to back fill its trenches without damaging pavements and adjacent utility lines, and that it was doing no more than the contract required when it did what was necessary to avoid that kind of damage. While the rejection was put on the cryptic ground that the claim was "not legally allowable",

the later letter to the General Accounting Office quoted in finding 17, seems to show that the rejection, though doubtfully decided upon, was made for the reason I have assumed.

As shown in the last paragraph of finding 15, the contracting officer, or his representative, was given the final authority to interpret the specifications. While I would not have interpreted them as he did, but would have found that an unforeseen condition, calling for an equitable adjustment under article 4 had been encountered, yet I think his interpretation was not arbitrary nor wholly unsupported by the relevant data. If in those circumstances it was not final, the only appeal from it was a possible appeal, which the contractor did not take, to the head of the department under article 15.

LITTLETON, *Judge*, concurs in the foregoing opinion.

BRAND INVESTMENT COMPANY (FORMERLY KNOWN AS A. W. KUTSCHE & COMPANY) v. THE UNITED STATES

[No. 44617. Decided June 5, 1944. Defendant's motion for new trial overruled October 2, 1944]*

On the Proofs

Government contract; unjustified stop order a breach of contract.—Where the Government has failed to present proof that a stop order issued to a contractor, resulting in delay in completion, was justified, it is *held* that the stop order was a breach of the contract, and plaintiff is entitled to recover.

Same; proportionate part of main office overhead recoverable for delay.—Where the Government was responsible for the delay in completion of construction contract, it is *held* that the contractor, plaintiff, is entitled to recover a proportionate part of its main office overhead during the period of delay.

Same; accounting practice as to main office overhead.—While such an element of damage can never be proved with mathematical accuracy, it is standard accounting practice to attribute main office expense to various company operations on some fair basis.

Same; rental value of contractor's equipment during period of unjustified delay; Phoenix Bridge Company v. United States, 85 C. Cls. 603 overruled.—Where the Government, in breach of its

*Defendant's petition for writ of certiorari denied February 26, 1945.

contract, by delaying completion in effect condemns a contractor's valuable and useful machines to a period of idleness and uselessness; it is *held* that the Government should make compensation comparable to what would be required if it took the machines for a temporary period but did not in fact use them, and as a jury verdict the court allows the proved rental value of the equipment discounted by one-half because of the absence of actual use with its resulting wear and tear. *Phoenix Bridge Company* v. *United States*, 85 C. Cls. 603, is overruled.

The Reporter's statement of the case:

Mr. Milton Roberts for the plaintiff. *Mr. Max N. Freeman* was on the briefs.

Mr. W. A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Mary K. Fagan* and *Mr. Milton Kramer* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, it having been incorporated in 1920 under the name of A. W. Kutsche & Company, under which name it continued until November 28, 1938, at which time its name was changed to Brand Investment Company.

2. December 10, 1932, plaintiff entered into a contract with the defendant acting through the Procurement Division of the Treasury Department for the construction of a Post Office building in New Castle, Pennsylvania. A copy of that contract is plaintiff's Exhibit 1 and is made a part hereof by reference.

3. Plaintiff was given notice to proceed January 16, 1933, and began construction work shortly thereafter.

4. September 12, 1933, during the progress of the work under the contract, the contract was modified by the acceptance by the defendant of plaintiff's proposal to deduct $1,500 from the contract price for the substitution of Indiana variegated limestone for Pennsylvania sandstone for all column caps and pilaster caps, and all stonework above the column and pilaster caps, including the lintels over the second-story windows.

5. Plaintiff proceeded with the construction of the building in accordance with the contract as modified. October

31, 1933, after plaintiff had begun setting the Indiana variegated limestone near the top of the building, it received from the defendant the following stop order:

POSTAL TELEGRAPH

CB724 47 NM Govt. 2 extra. 1933 Oct. 31 PM 7–27
PUS CHICAGO ILL. 31

A. W. KUTSCHE AND CO.,
2111 Woodward Ave., Det.:

RE ACCEPTANCE SEPTEMBER TWELFTH YOUR PROPOSAL DEDUCT FIFTEEN HUNDRED DOLLARS SUBSTITUTE INDIANA VARIEGATED LIMESTONE LIEU PENN SANDSTONE ALL COLUMN AND PILASTER CAPS AND STONEWORK ABOVE SAID CAPS INCLUDING LINTELS OVER SECOND STORY WINDOWS NEWCASTLE POST OFFICE DO NO FURTHER WORK CONNECTION THEREWITH UNTIL FURTHER ADVISED.

L. W. ROBERT, Jr.,
Washington, D. C.

Plaintiff complied with the stop order, and as a result further progress upon the construction of the building was necessarily suspended within a few days after November 1, 1933.

6. February 15, 1934, the defendant directed plaintiff to proceed with completion of the work in accordance with the contract as modified and thereupon plaintiff again started construction operations and successfully completed the construction of the Post Office. The period of delay caused by the stop order was 109 days.

7. Plaintiff had for use on the project certain equipment which was necessarily kept idle at the site of the project during the 109 days of delay. Its reasonable rental value for the 109-day period, reduced because it was not used, was $3,732.50.

8. Plaintiff claims that it had a labor overrun, or excess labor costs, for the period from February 21, 1934, the end of the stop-order period, to the completion of the job, amounting to $6,558.43, which, with insurance, overhead, and profit on said overrun item, amounts to $8,729.27. Plaintiff claims in one paragraph of its bill of particulars that this labor overrun for the project resulted from the National Industrial Recovery Act of June 16, 1933. It also claims

that the said labor overrun resulted from the stop-work order issued by the defendant.

The rates of pay paid by plaintiff to its workmen on the project met the requirements of the National Industrial Recovery Act so that it was not required to increase wages or reduce hours as a result of that act. From the commencement of the project plaintiff's labor costs were greater than its estimated labor costs, which overrun continued to increase throughout the contract period. After the stop order became effective, there was an increase in labor costs, but the evidence does not show the extent or the cause of the increase. Plaintiff experienced strikes, obtained extensions of time, and had some difficulty on account of subcontractors, which caused delay. It found that although it received enough workmen from the union at New Castle the men were not as productive as plaintiff had expected. This also tended to cause its costs to exceed its estimates.

The evidence does not show that plaintiff's overrun and increased labor costs were the result of the National Industrial Recovery Act or of the Government's stop order.

9. Because of the Government's stop order, plaintiff incurred the following expenses or damages:

Pay-roll expenses of superintendent, assistant superintendent, stenographers, watchman, and common labor and caring for premises	$1, 554. 99
Rent of office and purchase of material and supplies to protect the premises during the period of the stop order	356. 95
Expenses in connection with resumption of operations	182. 70
Rental value of equipment, discounted because of nonuse	2, 915. 75
Main office overhead	1, 071. 47
Workmen's compensation, public liability, and damage insurance	133. 76
Total	6, 215. 62

10. The Government's stop order was not justified and was a breach of its contract with the plaintiff.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff made a contract with the Government for the construction of a Post Office building at New Castle,

Pennsylvania. While the work was under way, the Government issued a telegraphic stop order, which is quoted in finding 5. This stop order was not lifted for 113 days, and the plaintiff was actually stopped in its work for 109 days. It claims that the stop order with its consequent delay was a breach of the contract and seeks damages. The Government undertook, at the hearing before the commissioner of this court, the burden of justifying the stop order and its duration, but presented no evidence at all to sustain that burden. It therefore properly concedes that the stop order was, so far as the evidence shows, unjustified, and we have so found. Being unjustified, it was a breach of the contract.

The remaining questions in the case have to do with some items of alleged damages. The plaintiff asks for a part of the cost of maintaining its main office during the period of the delay, proportionate to the relation which this contract bore to the total amount of all of its then current contracts, plus a large additional amount to compensate for the fact that its executives devoted more than a proportionate part of their time to attempts to get the New Castle job under way again during the period of the stop order. The Government urges that nothing should be allowed for main office expense, since it goes on regardless of what is happening on any or all of the contractor's jobs.

We are allowing the plaintiff a proportionate part of its main office overhead. While such an element of damage can never be proved with mathematical precision, it is standard accounting practice to attribute main office expense to various company operations on some fair basis, and we follow that practice. While it is probable that the plaintiff's executives did devote more than a proportionate part of their time to the New Castle job during the period of the stoppage, the amount of that excess has not been proved with measurable definiteness.

The other disputed element of damage is the rental value of machines and equipment which the plaintiff had on the job, and which were necessarily kept idle during the period of the stop order. The plaintiff proved that machines of this type had a certain rental value. The Government urges that the plaintiff was not in the business of renting machines

to others; that it would, probably, not have rented them even if they had not been tied up on this job by the indefiniteness of the duration of the stop order; that it has not shown that it had any other job on which it could have used them itself if they had not been tied to this job.

We think that the plaintiff is entitled to recover on this item of its claim. We do not allow the full amount of the rental value, since we recognize that, if rented, the machines would have suffered wear and tear which they did not suffer while idle on this job. But when the Government, in breach of its contract, in effect condemns a contractor's valuable and useful machines to a period of idleness and uselessness, we think that it should make compensation comparable to what would be required if it took the machines for use for a temporary period, but did not in fact use them. As a jury verdict, we allow the proved rental value, discounted by one-half because of the absence of actual use with its resulting wear and tear. We think that the contrary view expressed by the court in *Phoenix Bridge Company* v. *United States*, 85 C. Cls. 603, 631, should not be followed.

The plaintiff may recover $6,215.62.

It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissenting in part:

I do not agree with finding 9 allowing $2,915.75 as damages for "rental value of equipment" and that part of the majority opinion which holds broadly that where there is evidence that equipment used by a contractor in performance of a construction contract with the Government has a "rental value," such rental *value* so shown, or as here, some lesser amount, i. e., one-half of the claim for 109 days, estimated without proof relative thereto, is allowable against the Government as damage by reason of delay caused by the Government. My objection does not go to the proposition that in a proper case equipment rental is not a proper item to be allowed as damages when it is proven by clear and convincing evidence that fair market rental prices were actually

lost by reason of delay which made it impossible to rent the equipment or rendered it impossible to use it on some other available work. My opinion is that an actual loss or damage must be clearly proved and that mere inherent "rental value" alone, which is all we have here, cannot be allowed merely because there was unreasonable delay where it is necessary to assume (1) that the equipment *might* have been rented; (2) that it *might* have been used on other work, and (3) that the inherent "rental value" was only one-half of the total amount shown by the evidence submitted. This is guesswork. There must be proof of these facts.

I will agree that fair and reasonable rental for useful value, without profit, may, in a proper case, be used as the measure of actual damage or loss sustained on account of delay, if the proof is sufficient to establish such reasonable amount and further establish that the equipment could and would have been rented by the contractor if he had not been prevented from doing so, because the equipment was tied up on the work, or that it would have been used by the contractor on other available work for an equal period had the unreasonable delay, in connection with which damages are claimed, not occurred. If a profit on such useful value is proven by clear and direct proof, it may also be recovered. The fairness and reasonableness of the rental or useful value must be established by proper evidence. This is the rule which this court has always applied and which was applied in *Ernest J. Cotton et al.* v. *United States*, 38 C. Cls. 536, 543, 547, 548; *Howard P. Converse et al.* v. *United States*, 69 C. Cls. 670, 675, 680, 681; *Phoenix Bridge Co.* v. *United States*, 85 C. Cls. 603, 631, and other cases hereinafter mentioned. I am convinced that it is the correct rule to be followed, and that the *Phoenix Bridge Company* case should not be overruled; otherwise, the court will be placed in the position of allowing damage which was not within the reasonable contemplation of the parties when the contract was made, and which is speculative, uncertain, and conjectural. If the rule above mentioned is applied in this case, plaintiff is not entitled, on the record, to recover any amount on account of the alleged rental value of equipment. Ordinary depreciation of equipment during a delayed period may be

properly allowed as damage for delay if the amount of such depreciation is shown by sufficient evidence. *Bahen & Wright, Inc.* v. *United States*, 94 C. Cls. 356, 360, 361, 365. This case, in another aspect, will be discussed later.

The case of *Cotton et al.* v. *United States*, *supra*, involved a construction contract in Honolulu, T. H., and showed conclusively (although the court did not in the findings or the opinion discuss this phase of the case) that plaintiff had other work available in California (plaintiffs' principal place of business), in connection with which the equipment could and would have been used earlier had it not been for the delay of 94 days caused by the Government, and that the fair and reasonable actual value of such use was $19 a day. In that case there was an actual delay caused by the Government of 188 days, but for 94 days of such delay the equipment was used by the plaintiff on other work which it had nearby. There was further evidence that about $15 a day additional would represent a fair profit on a contract, or on a rental basis. Plaintiff claimed $25 a day as damages actually sustained on account of loss of use of his equipment valued at $17,000. The court, upon the proof submitted, made an ultimate finding of loss and damage and correctly allowed and approved an actual loss of $1,786 measured by the useful value of the equipment at $19 a day for 94 days.

In *Converse et al.* v. *United States*, *supra*, the court held on a new trial and under amended findings and supplemental opinion, April 21, 1930, that the contractor was entitled to recover as damages actually sustained on account of delay the fair and reasonable rental value of a dredge at $50 an hour for 25 hours under proof which was sufficient to establish that this was a fair measure of the value of the use of the dredge for the delay and that, except for the delay caused by the Government, the equipment would actually have been used on other work and that such other work was available and awaiting the use of this equipment at Charleston, S. C. The court, after its attention had been called to this evidence, made an amended finding that "The plaintiffs had another contract awaiting the use of the dredge as soon as the same could be repaired and put in condition for such

work. The fair and reasonable value of the dredge during the time lost was $50 per hour." It was on the basis of the proof and this finding that damage was held to be recoverable in the amount of $1,250.

In the original findings and opinion on the *Converse* case first published by the court March 3, 1930 (not reported in the Court of Claims reports, but see Vol. 553, Printed Records, Court of Claims), the court denied recovery on account of claimed useful value of the dredge based on a fair rental value on the ground that plaintiff had not proved it had sustained an actual loss in this regard on account of delay. In this opinion the court said:

> The evidence shows that delay was caused by defendant in the manner alleged by plaintiffs; on one occasion for over fourteen hours, and at another time for over ten hours. There is no evidence that plaintiffs lost anything by reason of payments to the working force while the dredge was idle. The plaintiffs could have completed the job about twenty-five hours earlier had they not been delayed in the manner above stated; but unless they had use for the dredge or could have leased it to some other party they received no damage from the delay. There is no evidence that the plaintiffs could have used the dredge on other contracts or could have leased it at any price. The plaintiffs' claim for damages on account of delays caused by the defendant must therefore be denied for want of proof of any damage resulting therefrom.

The evidence in the case at bar is incomplete on the matter of actual loss and is not like the evidence in the *Cotton* and *Converse* cases. The evidence here is very much like the evidence which was submitted in *Phoneix Bridge Company* case and the *Bahen & Wright, Inc.*, case, in which the plaintiff introduced evidence as to what the "rental value" of such equipment as it had would be, if rented, without submitting proof of the next step necessary to the recovery of actual damage sustained, namely, that if the equipment had not been tied up by delay by the Government it could and would have been rented or that plaintiff had other work on which it could have used the equipment at a date earlier than it was able to use it, because of the

Government's delay. Even where the Government stops the work it is incumbent on the contractor to rent his equipment if there is a convenient and available market for it, or to otherwise use it if he can. In other words, in the *Phoenix Bridge* and the *Bahen & Wright* cases, it was not shown and the court could not assume that plaintiff had any other use for the equipment during the period of delay. It was for this reason that the claimed "rental value" was denied as damages shown to have been actually sustained. If a contractor can rent or use equipment during a delayed period and elects not to do so, he cannot recover damages based on a rental value. Cases will hereinafter be cited which show, I think, that the existence of a rental market or availability of other use of equipment or property, which cannot be availed of because of the delay, is the real basis for allowance of damages based on the fair value of such use where the complaining party is deprived of the use of such property or equipment, or the opportunity to rent it, by the act of another party.

At the same time the *Phoenix Bridge* case, *supra*, was decided the court, on the same day (November 1, 1937), decided the case of *Schuler & McDonald, Inc.* v. *United States*, 85 C. Cls. 631, in which it was found and decided (641) that the Company was entitled to recover $1,925 as "The reasonable rental value of the equipment for the additional time it was not available for other use because of the shut-down order." Subsequently, on December 5, 1938, the court decided the case of *M. H. Sobel, et al.* v. *United States*, 88 C. Cls. 149, in which the court found and held (159, 166) that plaintiff had proved damages of $4,020 as "the reasonable rental value of plaintiff's equipment which was kept on the job for that time," i. e., 90 days' delay by the Government. On June 9, 1939, the court decided the case of *Wm. T. Joplin, et al.* v. *United States*, 89 C. Cls. 345, in which it was found and held (353, 358) that plaintiff had proved damages of $34,500 measured by the "reasonable rental value of such equipment for the portion of that period [8 months] when such equipment could reasonably have been rented"—if the work had not been delayed by defendant. Damage measured by the reasonable rental

value was allowed in the three cases mentioned upon evidence sufficient to establish actual loss of useful value, either by rental in an available market or use on other available work. The question of allowance in each case was carefully considered in the light of the holdings in the *Cotton*, *Converse*, and *Phoenix Bridge* cases, *supra*. An examination of the record evidence in the *Schuler*, *Sobel* and *Joplin* cases reveals that plaintiffs had fairly established by sufficient proof all the elements necessary to their right to the amounts allowed as damages actually sustained. The evidence was such that the Government did not contest the claims, but apparently conceded that plaintiffs had by adequate proof established their right to actual damages measured by a reasonable rental value for the use of the equipment involved. In the *Joplin* case the defendant raised only the question whether plaintiff should have minimized its damages by renting the equipment when suspension of the work occurred, but the plaintiff proved and the court was of opinion that in the particular circumstances it was impractical for the contractor to do so because the equipment was located and tied up in an extremely rough section of Mr. Rainier National Park.

On June 2, 1941, this court decided the case of *Bahen & Wright* v. *United States*, *supra*, in which only reasonable depreciation of the equipment, as established by the evidence, was allowed as damages actually sustained. Reasonable rental value of certain equipment and depreciation of certain other equipment and materials were claimed by plaintiff, and considerable evidence was submitted relative to such rental values and depreciation (see Vol. 779, Printed Records, Court of Claims). Plaintiff in that case, like the plaintiff in the case at bar, confined its evidence almost entirely to what a reasonable "rental value" would be if rented, and submitted inadequate evidence of availability of other use upon completion had the delay of 175 days not occurred, and no convincing evidence of availability of a "rental market" or of the fact that at the end of the work, had it not been delayed, the equipment involved could or would have been rented. The contractor's evidence in that case was stronger and more to the point with reference to a

rental market which could not be availed of than the evidence in the case at bar. Notwithstanding the vigorous and earnest contention of plaintiff in the *Bahen & Wright* case that damages measured by a reasonable "rental value" should be allowed as actual damages, sustained on authority of the *Schuler*, *Sobel* and *Joplin* cases, *supra*, the court did not think enough of the adequacy and strength of the proof that an actual loss of rental or useful value had been sustained to even mention the matter of "rental value" in the findings and opinion. This opinion in the *Bahen & Wright* case is a positive and recent approval of the uniform rule long followed by the court on such questions, and for which the Government contended in that case. The court overruled plaintiff's motion for a new trial based mainly on the alleged error of the court in refusing to allow damages measured by the "rental value" of equipment claimed for the period of delay.

I shall not undertake to discuss in detail the evidence in the case at bar, on which plaintiff claims damages of $5,831.50 for 109 days' delay or $6,045.50 for 113 days' delay, for "rental value" of equipment. I think it is sufficient to show that plaintiff has failed to prove it sustained actual damages, on account of the items of equipment in question, to point out that the evidence is far from convincing that during this period of the depression (1933–1934) the various items of equipment, in respect to which "rental value" is claimed as actual damages, could or would have been rented for any amount, and certainly not for 109 days' or 113 days' delay at the obviously high daily rates listed and claimed. There is no proof whatever that plaintiff had any other construction work in connection with which this equipment could or would have been used at a date earlier than it was needed or used after the New Castle job was completed. It is obvious that plaintiff had no other work on which this equipment could or would have been used soon after the New Castle job for if it had such work or had lost the opportunity to obtain it, by reason of the Government's delay, it certainly would have submitted some evidence as to that fact. In plaintiff's requested findings filed with the Commissioner it requested the Commissioner to

find that "The work would have been completed at least 109 days earlier had there been no enforced cessation of operations, and this equipment would have been released that much sooner *for use on other jobs on which plaintiff could have realized a profit.*" [Italics supplied.] No evidence on which such a finding of available use could be based was introduced.

Assuming that plaintiff might recover on proof only of a rental *value*, it appears from the evidencce submitted and an examination of the list of the equipment and the rental rates claimed that plaintiff's claim is unreasonably high because it is based on "daily rental value" at hourly rates instead of on a monthly value; it is admitted in the evidence that the rates used are higher than the fair monthly rental rates would be. In the end, plaintiff was delayed about three and one-half months, and, if the Government is liable at all, I do not think it is liable for more than a reasonable "rental value" on a monthly basis. This would, on that basis, be the full measure of the damages actually sustained. The record affords no basis for such a computation.

The equipment involved, the rental rate claimed, and the total damages claimed to have been sustained on plaintiff's theory, that "rental value" alone should be used, are set forth on page 4 of plaintiff's exhibit 38 and in its requested findings of fact filed with the Commissioner for periods of 109 days and 113 days, as follows:

Kind of Equipment	Daily rental rate	Rental for 109-day period	Rental for 113-day period
1 1-yard concrete mixer	$7.50	$817.50	$847.50
1 ½-yard concrete mixer	3.50	381.50	395.50
1 -2hoist-drum engine	5.00	545.00	565.00
1 Brick cage	1.00	109.00	113.00
1 Gasoline Pump	1.50	163.50	169.50
1 Level	1.00	109.00	113.00
1 Transit	1.00	109.00	113.00
1 Five-Ton Truck	15.00	1,635.00	1,695.00
1 Automobile	2.00	218.00	226.00
500 Patent Roos Shores (at .03 per day each)	15.00	1,635.00	1,695.00
Sundry small tools	.50	54.50	56.50
Office Equipment	.50	54.50	56.50
Total		5,831.50	6,045.50

The majority opinion reduces plaintiff's claim of $5,831.50 to $2,915.75, but there is no evidence whatsoever on which this reduction can be justified. By doing this the court is acting as a witness in the case as to what equipment may or may not have a rental value and as to what that rental value would be. Without some evidence as to these facts, a jury would not be permitted to make such an estimate. *United States* v. *Smith*, 94 U. S. 214, 219. Plaintiff's proof of inherent rental value totaling $5,831.50 is much stronger and more to the point than is the proof of a rental market or loss of use. We should not reject the proof as to one fact and supply it as to another. The entire claim should be denied for lack of adequate proof of actual loss.

Since plaintiff computes its claim on a daily basis, it seems obvious that if there had been an available and ready market for rental of its equipment on a daily basis then plaintiff could and should have rented this equipment from day to day at hourly rates in order to minimize its damage. It had full possession of the equipment at all times. This would not have interfered with the orderly resumption of work. The proof shows that after the work was shut down it required some time to resume operations. The evidence shows that the rental *market* was such as to enable plaintiff to rent only one item of its equipment for $21.50 during the delayed period. If there was a rental market, as plaintiff claims, for the balance of the equipment, plaintiff should have rented it.

In the case of *Wicker* v. *Hoppock*, 6 Wall. 94, 99, the court said: "* * * where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach thereof, at a trifling expense or with reasonable exertions, it is his duty to do it; and he can charge the delinquent party with such damages only, as with reasonable endeavors and expense, he could not prevent." The same rule was stated in another way in *Smith* v. *United States*, 11 C. Cls. 707, 711, wherein the court said: "A jury must take into consideration all the facts and circumstances of a case, and while excluding losses due to the negligence of the contractor, allow to him such damages as, with reasonable diligence and prudence on his part, would put him in the

same situation at the end of the work that he would have been in if he had not been interefered with. On the one hand, the defendant in such a case is not required to pay more for the suspension which he has requested than it is reasonably worth; on the other, he is bound to make the contractor whole." See *Shabaub* v. *DeLaice*, 59 S. W. (2) 954. In affirming this court, the Supreme Court in *United States* v. *Smith*, 94 U. S. 214, 218, 219, said:

> The Court of Claims has found the amount of damages to have been $5,000; * * * not allowing anything for loss or injury to his materials, which he might have prevented by the exercise of reasonable care and prudence. This rule of damages, as an abstract proposition, is clearly right. * * *. The United States can be required to make compensation to a contractor for damages which he has actually sustained by their default in the performance of their undertakings to him; but this is the extent of their liability in the Court of Claims. More than compensation for damages actually sustained can never be awarded against the United States. * * *. In the award of damages the Court of Claims occupies a position of a jury under like circumstances. Damages must be proved. The Court is not permitted to guess any more than a jury, but, like a jury, it must make its estimates from the proof submitted.

Damages, in order to be allowable, must be such as were within the reasonable contemplation of the parties to the contract and they must flow directly and naturally from breach of the contract; they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent. The damages claimed by plaintiff in this case as "rental value" are, under the evidence of record, uncertain, speculative, and contingent. In *United States* v. *Wyckoff Pipe & Creosoting Company, Inc.*, 271 U. S. 263, 267, the court said:

> The contractor urges also that, because of the delay, it might have used the supplies purchased on another job, receiving on that their then market value, or might have sold them and taken the incidental profit due to the rise in values; and that, if it had done either and had been obliged later to purchase new supplies at the higher market values in order to perform the Govern-

> ment job, the increased cost would have been recoverable as a loss; and that, as the amount of this increase has been found, the recovery should be sustained at least to that extent. The contractor's contentions, however, ignore the rule that damages for delay are limited to the actual losses incurred. The contractor elected to hold itself in readiness to perform its contract and to this end to retain both the lumber and the creosote oil. The carrying charges thus incurred are an allowable item of damage; but these were not shown. It may even be that in the event of a use or resale of the supplies, if under the circumstances such a course of action was open to the contractor, the profits made would have been available in reduction of damages. Compare *Erie County Natural Gas & Fuel Co.* v. *Carroll*, [1911] A. C. 105. But clearly it cannot now charge as a loss profits which it might have made if it had sold the supplies in the market or used them on another job.

From the evidence of record the conclusion seems to be inescapable that in the alleged "rental value" claimed in the tabulation above set forth plaintiff has included a considerable profit in such rental value. Whether it would have made such a profit is not proven by the clear and direct proof which the law requires for the recovery of profits. The Government is not liable for profits, as damages, on excess costs or losses due to delay where the contract is completed and where no extra work is involved. Profits that might be made on a rental or other contract are never allowable as damages unless they are established by clear and direct proof. Plaintiff's principal witness testified that in fixing the rental values claimed he made use of the values prepared and kept in plaintiff's records for the purpose of use, by plaintiff, in estimating and bidding on construction contracts. This is not sufficient to prove that such profits usually so included in contract bids would have been made on a rental basis. The proof shows that plaintiff was not in the business of renting its equipment.

In the case of *M. H. McCloskey, Jr. (Inc.), et al.* v. *United States*, 66 C. Cls. 105, 130, the court said: "* * * but the plaintiff will not be allowed anything for profit [on the loss and expense due to delay] which it might have made as that sum was included in the contract price which, under

the judgment to be rendered herein, it will receive together with the damages caused by delay." The same rule was applied in *The Rust Engineering Co.* v. *United States*, 86 C. Cls. 461, 475, and *Gustav Hirsch* v. *United States*, 94 C. Cls. 602, 635.

There is no evidence in this record that plaintiff, when making its bid, computed the charge included therein for use of equipment strictly on the basis of a 420-day period fixed by the Government for completion, or for a longer period in anticipation of some delay in completion. If in computing its bid it included a charge for the use of equipment, including profit, for a longer period than 420 days, it cannot recover twice for such use. In a suit for actual damage for delay such fact should be shown.

Ordinary depreciation of equipment during a period of unreasonable delay of 175 days caused by the Government was allowed as actual damages sustained under proof satisfactorily showing the amount of such depreciation for such period in *Bahen & Wright, Inc.* v. *United States*, *supra.* The Government in that case contended for that rule of measuring the damage, as it had contended in *Cotton* v. *United States*, *supra*, in which latter case the Government admitted depreciation of $555. Also, in the case at bar, the Government contends that the most plaintiff can recover is ordinary depreciation of equipment for 109-days, but it correctly insists that such allowance cannot be made since there is a complete absence of proof as to the amount of such reasonable depreciation.

It is said, in effect, in the majority opinion that in a case where the proof shows only that equipment had a rental *value* the court should make compensation comparable to what would be required of the Government if it took the equipment for use for a temporary period but did not, in fact, use it. The two situations are not at all comparable. In the case of a taking there would be a dispossession and an implied agreement to pay a reasonable compensation. We denied recovery of any amount in such a situation in the case of *Excavating Equipment Dealers, Inc.*, v. *United States*, 93 C. Cls. 82, 90–97, because the proof did not show an implied agreement to pay reasonable compensation. The

Government cannot be held liable for taking or deprivation of use of property even for a temporary period in the absence of a contract implied in fact to pay reasonable compensation therefor.

In the case of *The Pensacola*, 263 Fed. 661, 666, damage for loss of useful value was allowed for breach of contract to tow a dredge. In that case a tug had been hired under a charter to tow a dredge to Mobile on a certain day, at which place the dredge was to engage in work awaiting it. The tug arrived four days late to begin the tow, with the result that the dredge was delayed for the same period in being put on the work. The owner was allowed as damages for the breach of the towing contract the reasonable value of use, or hire, of the dredge for the delay of four days. This case illustrates the rule that the proof should show not only that the owner was deprived of use, but that there was actual loss of use to the owner, and that the fair value of such use measured by reasonable hire for such period is the reasonable and proper measure of damage actually sustained.

In the case of a construction contract the equipment is dedicated to completion of the contract according to its terms, and when the contract is completed, as was the case here, the contractor receives his agreed price and profit for use of such equipment. There is no dispossession and there is no implied agreement apart from such implications as arise from the written contract to pay more, and the contractor can recover under the written contract no more than actual damages sustained. The reason is that the parties to the contract cannot be presumed to have contemplated that the Government would pay more than that. Theoretical damages cannot be allowed. If there is a rental *market* or other use available and the contractor elects not to avail himself of such rental market or use, he cannot complain that the other party has actually damaged him by delay. If there is undue interference and delay, the contractor can recover whatever he actually lost in connection with the equipment assigned to and used on the contract, as a result of the delay, but he must prove such a loss by showing that the nature of the delay or the peculiar circumstances were such that he could not take advantage of an available

market, or otherwise use his equipment, and not merely that the equipment had an inherent rental *value*. On the other hand, where property or equipment is taken and held by the Government through some agent authorized to do so for a temporary period, there is an implied agreement to pay reasonable and just compensation therefor, whether it is actually used or not, and the best if not the only basis for fairly measuring the reasonable compensation to the owner in such a case is a fair usable value therefor or a fair rental price, without interest. *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228; *International Harvester Co. of America* v. *United States*, 72 C. Cls. 707. The fair value of use to the owner is also the usual measure of damages for injury to or deprivation of use to the owner of ships and vessels in tort cases, as hereinafter more fully set forth, but, in such cases, the whole subject matter is the property itself and the value of its use to the owner, rather than a claimed loss or actual damage for delay constituting a breach of a construction contract in connection with which certain equipment is used.

If one commits such an act as deprives another of his dwelling house, the measure of compensation to the owner for such deprivation would naturally be the fair value of use to the owner, even though the owner might not have rented the house during such period, and a fair rental rate would be a proper measure of compensation necessary to make the owner whole, but the situation would, I think, be different if the owner of the house had dedicated it to performance of a contract with the other person at a profit, and such other person had caused delay in completion of the contract and the release of the building to the owner. In such a case it would seem to be necessary for the owner of the house to prove that during such delay he sustained actual damage as a result of the breach of contract, in addition to proving the fact that such a house had an inherent "rental value." In other words, I think the owner of the house would have to prove that there was a rental market and that, except for the delay, he could and would have rented the house, or, that he would otherwise have made

valuable use of the house upon timely completion of the contract.

When there is a direct taking or deprivation of use of property, there is an implication of an agreement to pay fair and reasonable compensation therefor, and reasonable rental or reasonable usable value is a proper measure of this compensation. However, when there is delay which constitutes a breach of contract in connection with the performance of which the property or equipment is used, there is an implication of an agreement to pay *only damages actually sustained* and an actual loss must be proved;—compensation is the fundamental principle, but actual loss is the measure of this compensation.

In *Smith* v. *Gunn*, 57 Tex. Civ. App. 339 (122 S. W. 919), the contractor delayed construction of a building beyond the time fixed, and the owner sued to recover damages measured by the reasonable rental value of the building during the delayed period—the court said: "There was also error committed in that portion of the Court's charge which instructed the jury that if there was inexcusable delay in the construction and delivery of the building, but that during the time of such delay the building would not have had a use or rental value to the plaintiff, then to return a verdict for the defendant. Under the circumstances referred to, the plaintiff would have been entitled to a verdict for nominal damages and costs, and for that reason it was error to give such instruction."

The measure of damages for wrongful detention or deprivation of property is its usable value. *Continental Gin Co.* v. *Clement et al.*, 4 S. W. (2d) 901, 902, 904; *Anderson et al.* v. *Jensen et al.*, 265 Pac. 745; *Parsons* v. *Eisele*, 277 Pac. 643.

In the case of *Constitution Indemnity Co. of Philadelphia* v. *Armbrust et al.*, 25 S. W. (2d) 176, the contract called for the construction of a home for Armbrust and his wife, and the contractor abandoned the contract and the owners completed the work. Delay of several months in completion resulted from failure of the contractor to complete the house, and the owners sued for damages for this delay, and the jury gave them a verdict for the fair usable value of the

house. The defendant contended that it had not been shown that actual damages had been sustained. The court, at page 179, said: "We cannot agree with the proposition that, if the completion of a home is delayed a period of several months, the owner is not entitled to recover the value of the use of the property during that time. The courts do not look with favor on such a contention. The owners assert that by reason of the delay they are entitled to recover the value of the use of the property during such period of delay. This has long been the law. *Walsh* v. *M. E. Church, South,* (Tex. Com. App.) 212 S. W. 950."

In cases involving suits for damages for injury to ships, or vessels, the fair value to the owner of use of the vessel of which he was deprived has been made the measure of damages sustained, but, in all such cases, there was sufficient evidence in the record to convince the court that there was an actual useful value to the owner, of which he had been deprived, and that such useful value could be properly measured in money. *The Conqueror,* 166 U. S. 110; *The Cayuga,* 2 Benedict 125 ($75 a day for damage to a ferry boat), affirmed 14 Wall. 270. In the case of *No. 7 Steam Sand Pump Dredger and S. S. Greta Holme* (1897) App. Cases 596, the dredger owned by the Harbor Board was employed and used by the Board for the purpose of keeping the Harbor in condition, and it was damaged and sunk in a collision. The Board immediately purchased a new dredge and used it in place of the *Greta Holme.* Suit for damages was brought on account of the damage to and sinking of the *Greta Holme.* The Court of Appeals held that no damage in excess of the cost of repairs could be allowed to the Harbor Board because, as the court concluded, none had been sustained. The House of Lords reversed this decision and held that the Harbor Board, as the owner of the vessel injured, was entitled to damages measured by the useful value for the period during which the dredge was necessarily out of use for necessary repairs, and that, in such case, it was not necessary for the Harbor Board to show that it could have made money by using or leasing the dredge for the period during which the Board was deprived of its use. Halsbury, L. C. said (602); "That the

dredger was required for their use cannot be denied; that their operations in reducing the silting up were delayed by the loss of it cannot be denied. I know of no reason why the public body are not entitled to the ordinary rights which other people possess of obtaining damages for the damage occasioned by the negligence of the wrong doer." Lord Herschell said:

> I take it to be clear law that in general a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover the damages in respect thereof even though he cannot prove what has been called tangible pecuniary loss by which I understand is meant that he is a definite sum of money out of pocket due to the wrong sustained.
>
> If the appellants had hired a dredger instead of purchasing one and had during the months they were deprived of its use been bound to pay for its hire it cannot be doubted that the sum so paid would have been recovered. How can they the less be entitled to damages because instead of hiring a dredger they invested their money in its purchase?

The same rule was applied in *The Mediana* (1900) App. Cases, 113, in which a lightship belonging to the Harbor Board was damaged in a collision. Another ship owned by the Board and maintained for the purpose of such an emergency was used by the Board in place of the damaged lightship until it was repaired. The House of Lords held that the Board was entitled to recover from appellant not only the out of pocket expense for repair of the damage caused by the collision but, also, substantial damage for the loss of the services of the damaged lightship during the period it was necessary to use the other lightship in her place.

The value of loss of use of a Danish warship resulting from a collision was allowed for the period necessary to make repairs in *The Astrakhan* (1910) LR P. D. 172.

In cases involving delay by a contractor in the completion of a building, the fair rental value of the use of such building has been used and allowed as the fair measure of damages to the owner for loss of earlier use of the building involved. In *Wing & Bostwick Co.* v. *U. S. Fidelity &*

Guaranty Co., 150 Fed. 672, 676, 677, the contract called for completion of a building August 1, 1903, and it was delayed in completion, and the owner brought suit for damages. The court said:

> It is well settled that ordinarily, when there has been a delay in the completion of a building or performance of the work, the rental value of the premises is the true measure of damages. The contract in suit does not specify any penalty, and strictly speaking, time of performance was not of the essence of the contract. Nevertheless, when the construction of a building has been delayed, there being no extension of the time or waiver, the damages are the loss of the rent. [Citing cases] * * *. Evidence was given tending to show that the rental loss of the plaintiff, by reason of its inability for a period of 10 months to occupy the premises, amounted to $2,300 or $250 for each month's delay. * * *, I allow as damages the sum of $200 per month [10 per cent of the cost of the building] from August 1st, the time when the building should have been completed, to April 20th, when I think it was possible for the plaintiff to move into the building; the total amount of such loss being $1,733.33.

See *Cannon* v. *Hunt*, 113 Ga. 501, 511 (38 S. E. 983); *Leifer Mfg. Co.* v. *Gross*, 93 Ark. (124 S. W. 1039); *Bounds* v. *Hickerson*, 26 Tex. Civ. App. 608, 609 (63 S. W. 887); *Smith* v. *Gunn*, 57 Tex. Civ. App. 339 (122 S. W. 919).

The case of *Phillips and Colby Construction Company* v. *Seymour et al.*, 91 U. S. 646, involved the construction of a railroad for Seymour et al. within a specified time and it was delayed. The court said (at p. 652):

> The attempt [by Seymour et al.] was to show, that, by the use of the road at an earlier day, much profit would have resulted. But the witness stated that the road ran through a wild, uninhabited country; that he expected that saw-mills would have been established along the line of the road, and the transportation of lumber incident to the use of such mills would have made the defendant a profit of $20,000.
>
> The whole basis of this calculation is conjectural, uncertain, and vague. It is manifestly no safe basis on which it can be assumed that any business would have been done in the few days of the delay; or that, if done, it would have been done at a profit. There was

nothing on which a jury could have done any thing but conjecture and speculate, at the hazard of sacrificing truth and justice.

What the court said above is applicable in the case at bar. Here we must speculate and conjecture with reference to several matters. We should not open the door for allowance of damages for delay on account of equipment rental any wider than it has been opened by the decisions of this court in *Cotton* v. *United States*, *supra; Converse et al.* v. *United States*, *supra; Phoenix Bridge Company* v. *United States*, *supra;* and *Bahen & Wright, Inc.* v. *United States*, *supra.*

Plaintiff's claim for rental value as damages sustained should be denied.

JONES, *Judge*, took no part in the decision of this case.

W. A. MERRILL SONS AND COMPANY, INC., A CORPORATION, v. THE UNITED STATES

[No. 44114. Decided June 5, 1944. Plaintiff's motion for new trial overruled October 2, 1944]

On the Proofs

Jurisdiction under the Act of June 25, 1938; increased labor costs as a result of enactment of National Industrial Recovery Administration Act.—Where plaintiff did not file a claim under the claims settlement act of June 16, 1934 (48 Stat. 975) for increased labor costs under the National Industrial Recovery Administration Act, the Court of Claims has no jurisdiction, under section 1 of the Act of June 25, 1938, to hear and determine the claim in the instant suit.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for plaintiff.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Mr. Newell A. Clapp was on brief.

Plaintiff brought this suit under an act of June 25, 1938 (52 Stat. 1197), and seeks to recover $7,127.39 as increased

costs alleged to have been incurred in the performance of a contract with defendant as a result of the enactment of the National Industrial Recovery Act.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation of the Commonwealth of Pennsylvania with its principal office and place of business in Philadelphia. The coal involved herein was produced from Ponfeigh No. 7 mine and, in part, from Ponfeigh No. 2 mine located in Garrett, Pennsylvania. These two mines are operated by the Enterprise Coal Mining Company, Inc., Garrett, Pennsylvania. W. A. Merrill Sons and Company, Inc., is the exclusive sales agent for the Enterprise Coal Mining Company, Inc. These two companies are distinct and separate corporate entities. Charles A. Merrill is president of both corporations. Commissions of 8% were regularly allowed the plaintiff on sales made by it for the Enterprise Coal Mining Company.

2. May 22, 1933, the White Star Coal Co., 75 West Street, New York, New York, entered into contract W 626 QM-14276 with the defendant represented by Robert T. Willkie, Capt., Q. M. Corps, whereby the White Star Coal Co., Inc., agreed to furnish and deliver "Bituminous coal in the quantities, at the destinations, and for the consideration stated in, and in strict accordance with the Standard Government Purchase conditions, and Schedule of Supplies," A to K, inclusive, and related change orders, attached to and made a part of the contract.

3. The following schedules of supplies are the only ones that are pertinent:

Schedule of Supplies "E" dated May 22, 1933, required the White Star Coal Co. to deliver 6,000 net tons of Bituminous R/M, coal at a unit price of $4.02, total price $24,120 F. O. B. New York Port of Embarkation, Brooklyn, New York. This coal was furnished from Ponfeigh No. 7 mine, Garrett, Pennsylvania, operated by the Enterprise Coal Mining Company. Deliveries were required to be made at the rate of four cars weekly as called for by the Port Quartermaster, New York Port of Embarkation, Brooklyn, New

York, between June 15, 1933, and March 31, 1934. The final delivery date was extended to May 15, 1934, by change order B dated March 22, 1934.

Schedule of Supplies "K" dated May 22, 1933 required the White Star Coal Co. to deliver 3,750 net tons of bituminous R/M coal at a unit price of $4.37, total price $16,387.50 F. O. B. in steel hopper bottom cars * * * by June 26, 1933, to Picatinny Arsenal, Picatinny, New Jersey.

On July 10, 1933 change order A was issued, whereby Schedule of Supplies "K" was modified to provide for the delivery of 20,000 net tons in lieu of 3,750 net tons of bituminous coal to Picatinny Arsenal and the total cost of the coal under this schedule was increased to $87,400, deliveries to be made between July 1, 1933 and June 30, 1934, subject to the terms and conditions of the original contract. The total cost of the contract was increased to $153,392.97.

On April 6, 1934 change order C was issued, whereby Schedule of Supplies "K" was further modified by increasing the quantity of coal to be delivered thereunder to Picatinny Arsenal, by 10,000 net tons, or a total quantity of 30,000 net tons. The total cost of the coal under this schedule was increased from $87,400 to $131,100, and the total cost of the contract to $197,092.97. This change order further provided that delivery of the additional 10,000 net tons would be completed by June 8, 1934, and the White Star Coal Co. was authorized to include shipments from Ponfeigh No. 2 mine at Garrett, Pennsylvania, operated by the Enterprise Coal Mining Company.

4. Standard Government Conditions (Coal), Standard Form No. 43, made a part of the contract, provided in part as follows:

> 3. *Wage scales.*—The contract price specified herein for the coal is based upon the wage scales in effect with mine employees on the date of opening of bids, and any increase or decrease in the cost of production of said coal caused by changes in such wage scale shall correspondingly increase or decrease the contract price of coal on any tonnage mined and shipped thereafter not in arrears at the time the change in wage scales becomes effective: *Provided, however,* That in event of any such increase in cost of production due to increase in wage

scales, the claim shall be presented within 60 days and supported by the affidavit of the superintendent or corresponding officer of the mine or mines from which the coal was produced and by report of a certified public accountant showing the cost of mining the coal before the increase in the wage scales, the amount of the increase in the wage scales after the date of the opening of bids, and the amount of such increase applicable to the coal delivered under this contract after the date of such increase. The books of the contractor shall be so kept as to show the foregoing facts and shall be open to inspection by an authorized officer or employee of the Government. No increase over the contract price shall be allowed unless the claim is so presented and the books of the contractor are so kept. In event of a decrease in cost of production due to decrease in the wage scales, the decrease in the contract price shall be computed on the basis of the affidavit or affidavits of superintendent or other corresponding officer of the mine or mines from which the coal was produced or upon other evidence. When there has been no change in the wage scales during the production of the contract coal, the contractor shall so certify on invoices or vouchers submitted for payment.

A copy of contract No. W626 qm–14276 dated May 22, 1933 and related papers, including Standard Government Purchase Conditions (coal); Schedules of Supplies "A" to "K," inclusive; performance bond; and the Standard Government Form of Bid are in evidence as stipulation "A," exhibit No. 1, and are made a part hereof by reference.

5. Before executing the contract of May 22, 1933, entered into with the United States, the White Star Coal Co., Inc., made a verbal agreement with W. A. Merrill Sons and Company for the furnishing of coal to be delivered under contract to various Army posts including, among others, Picatinny Arsenal, Dover, New Jersey, and the Port Quartermaster, New York Port of Embarkation, Brooklyn, New York. Pursuant to this verbal agreement the White Star Coal Co., agreed to pay the W. A. Merrill Sons and Company any increase in the cost of production of the coal caused by changes in the wage scales, and further that the method of calculating and paying such wage scale increases would be the same as that prescribed in paragraph 3 of the Standard Government Purchase Conditions (coal), made a part of the contract of

May 22, 1933, and that such funds would be remitted by the White Star Coal Co. to W. A. Merrill Sons and Company as and when received from the Department of the Federal Government authorized to pay the same.

6. October 3, 1933, the Southern Somerset Coal Operators Association for its members, including the Enterprise Coal Mining Company, signed an agreement pursuant to the President's Reemployment Order dated September 29, 1933.

October 16, 1933, the Code Authority (under Bituminous Coal Code), Eastern Subdivision of Division No. 1, Altoona, Pennsylvania, forwarded the following letter to all Bituminous coal operators under Code Authority, Eastern Subdivision of Division No. 1, including the Enterprise Coal Mining Company:

> The Production Committee of the Code Authority determined the amount of increase in production costs resulting from an application of the Code of Fair Competition and changed working conditions thereby. The Committee found that, effective October 2d, the additional cost, excluding increase in wage rates, would be as follows:

	Cents per net ton
Unionization	8
Shorter Work Day	5
Increase in Supply Cost	5
Increase in Power	1
Increase in Workmen's Compensation Insurance	2
Cost of Administration—N. R. A	2
Total	23

> In the judgment of the Code Authority the above increases in cost of production are minimum. Increased labor cost as of October 2d is not itemized above for the increase will vary, depending upon the various rates in effect prior to the October 2d wage scale and must be determined by each operator.
>
> The Code Authority at its meeting in New York City on Friday, October 13th, adopted the following Resolution:
>
> "RESOLVED, That under the power vested in this Code Authority by Section 6, Article VIII of the Rules and Regulations, the maximum commission to be allowed an agent and the maximum discount to be granted a wholesaler shall be as follows:

"(1) Where sales or resales are made at the price established and published by the Code Authority, the maximum commission or discount shall be 8% of such price;

"(2) Where sales or resales are made at a price in excess of the established price, there may be allowed, in addition to the above commission or discount from the established price, all or such part of such excess as may be agreed upon by the parties."

7. Final delivery of the coal under the contract was completed by the White Star Coal Co., on June 5, 1934. During the performance of the contract, production costs at the mines of the Enterprise Coal Mining Company were increased by the following increases in mine wage scales:

	Per net ton
1. Effective August 1, 1933	$0.2454
2. Effective October 2, 1933	.2685
3. Effective April 2, 1934	.2276

These wage scale increases do not form any part of the item of 23¢ per net ton representing the estimated increase in production costs as determined by the Code Authority and published by it on October 16, 1933, as set forth in finding 6. The Enterprise Coal Mining Company paid such wage increases to its mine employees and all such wage increases were reflected in the invoices submitted by the White Star Coal Co. to the defendant and were paid by the defendant in due course pursuant to the terms of the contract of May 22, 1933. No part of such wage increases is involved in this suit.

The sole demand presented by the plaintiff herein is its asserted right to recover the item of 23¢ per net ton representing the estimated increase in production costs by reason of compliance with the requirements of the National Industrial Recovery Act, as determined by the Code Authority, for 30,988.65 net tons of coal delivered by the White Star Coal Co. under its contract with the defendant during the period from October 2, 1933 to June 30, 1934, amounting to $7,127.39.

8. As soon as the auditor for the Enterprise Coal Mining Company submitted his report evidencing the wage-scale increase paid to the mine employees, namely, $0.2685 per

net ton, effective October 2, 1933, the White Star Coal Co. included in each of the invoices submitted by it to the defendant after that date an additional item of 23¢ per net ton, representing the estimated increase in the production cost of coal exclusive of wage rate increases resulting from compliance with the requirements of the National Industrial Recovery Act as determined by the Code Authority and published by it on October 16, 1933.

The Acting Quartermaster General, on March 15, 1934, made the following determination:

> It is not considered that the additional cost of $0.23 per ton reported to have been authorized by the Production Committee of the Code Authority comes within the meaning of Article 3, Standard Form 43.

Thereafter, the War Department disapproved payment of the item of 23¢ per net ton as a part of the increased wage rates effective October 2, 1933, and the White Star Coal Co. presented to the General Accounting Office its claims for payment of increased product costs under the terms of the contract and particularly its claim for payment of the specific item of 23¢ per net ton, representing the estimated increase in the cost of producing coal due to compliance with the requirements of the National Industrial Recovery Act, as determined by the Code Authority.

The General Accounting Office disallowed these claims as not representing proper charges under the terms of the contract, and specifically on the following grounds:

> Under the provisions of paragraph 3, Standard Government Purchase Conditions (Coal), made a part of the contract, only such items of labor cost which were increased as the result of increase in wage scales of mine employees engaged in a laboring capacity at the mine from which the coal was produced may be considered in computing the increased cost of production of coal mined and shipped under the contract subsequent to the increase in wage scales. Accordingly, the items of superintendent, Compensation Insurance and Addition Code Costs, which are items of general overhead and supervision, and which were included in statements of actual cost may not properly be included in determining increases in cost of production caused by changes in wage scales.

These are the only claims presented by the White Star Coal Co. to the War Department and the General Accounting Office under the contract of May 22, 1933, and no other claims arising out of the contract were ever presented by anyone to the defendant for administrative determination.

The several decisions of the Comptroller General disallowing the claims presented by the White Star Coal Co. are in evidence as plaintiff's Exhibit 4, and are made a part hereof by reference.

9. The Special Jurisdictional Act approved June 25, 1938 (52 Stat. 1197) conferred jurisdiction on the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of Government contractors * * * for increased costs incurred as a result of the enactment of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195) and provided in part as follows:

> * * * this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934 (41 U. S. C., Sec. 28–33).

Section 4 of the Act of June 16, 1934 (48 Stat. 975) provides:

> No claim hereunder shall be considered or allowed unless presented within six months from the date of approval of this Act or, at the option of the claimant, within six months after the completion of the contract, except in the discretion of the Comptroller General for good cause shown by the claimant.

10. Plaintiff reduced its claim in this suit from the amount stated in the petition, namely, $9,415.35, to $7,127.39. This amount is computed by multiplying 30,988.65 net tons of coal; that is, the quantity shipped and delivered to the defendant under the contract of May 22, 1933, during the period from October 2, 1933, to June 30, 1934, by 23¢ per net ton, and this alleged increase of 23¢ per net ton is based upon the following estimate of increased production costs exclusive of increased wage rates resulting from the application of the

Code of Fair Competition under the National Industrial Recovery Act as determined by the Code Authority of the Bituminous Coal Industry and published by it on October 16, 1933, namely:

	Cents per net ton
Unionization	8
Shorter Work Day	5
Increase in Supply Cost	5
Increase in Power	1
Increase in Workmen's Compensation Insurance	2
Cost of Administration—N. R. A.	2
	23

11. Defendant's auditors examined plaintiff's books and records in Philadelphia, Pennsylvania, and also the books and records of the Enterprise Coal Mining Company, in Garrett, Pennsylvania.

The books and records of the W. A. Merrill Sons and Company, plaintiff herein, do not reflect that this increased price of 23¢ per ton or any part thereof was paid by it for the coal involved herein, but the pertinent records do reflect that after the effective date of October 2, 1933, the Enterprise Coal Mining Company, which produced the coal, billed the W. A. Merrill Sons and Company at the increased price of 23¢ per ton, and that company in turn billed such increased price to the White Star Coal Co. Plaintiff's books reflect that the White Star Coal Co. owed it the sum of $8,299.77 on a running account; that this amount, namely, $8,299.77, was considered to be uncollectible and was charged off in September 1942; that at the same time the plaintiff set up on its books an account receivable for the same amount from the United States Court of Claims. Plaintiff's books also reflect that a running balance of $8,299.77 owed by it to the Enterprise Coal Mining Company was reduced by the payment of $4,200 paid by it to the Enterprise Coal Mining Company, on August 26, 1936.

The books of the Enterprise Coal Mining Company reflect that on September 2, 1936, it received the sum of $4,200 from W. A. Merrill Sons and Company, plaintiff herein, and this

amount was applied against a running balance owed to it by the plaintiff. On December 31, 1935, the balance of this running account totaled $23,801.84 and on December 31, 1936, the balance was $23,382. Plaintiff's ledger reflects a regular account recording billings to the plaintiff by the Enterprise Coal Mining Company for coal delivered on orders obtained by the plaintiff. The account also reflects offsetting items representing payments to the Enterprise Coal Mining Company of collections made by the plaintiff. The prices billed by the Enterprise Coal Mining Company to the plaintiff are net, after deductions of a sum representing 8% commission. No separate account was kept on the books of the Enterprise Coal Mining Company relating to coal to be delivered to the defendant, and the invoices from the Enterprise Coal Mining Company to its selling agent, W. A. Merrill Sons and Company, included all shipments of coal on orders from the plaintiff, irrespective of whether the ultimate consignee was the United States or a private concern. The books of the Enterprise Coal Mining Company contain a notation describing the amount of $4,200 received by it on September 2, 1936, as an "advance on Government money", but the books and records do not reflect that this amount relates to increased costs due to the National Industrial Recovery Act.

12. It cannot be demonstrated from the books and records of the plaintiff nor from the books and records of the Enterprise Coal Mining Company that the latter company actually incurred an increased cost of 23¢ per ton or any part thereof in producing the quantity of coal herein involved, namely, 30,988.65 net tons, due to the enactment of the National Industrial Recovery Act. The increase of 23¢ per ton claimed herein represents an estimated increased production cost determined by the Code Authority of the Bituminous Coal Industry as contained in the bulletin published by the Code Authority on October 16, 1933. Whether the Enterprise Coal Mining Company actually experienced any increased costs in the production of coal in excess of the

increased costs actually paid by the defendant to the White Star Coal Co., cannot be demonstrated.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The questions presented are (1) whether plaintiff filed a claim under the claims settlement act of June 16, 1934 (48 Stat. 975), and, if so, (2) whether plaintiff incurred the claimed increased costs of $7,127.39 as a result of the enactment of the National Industrial Recovery Act.

The facts are not in dispute. Finding 7 shows that this suit is the only demand that has been presented by plaintiff to the Government and that plaintiff has never presented a claim or demand under section 4 of the act of June 16, 1934, to the War Department or to the Comptroller General for reimbursement of a sum representing the 23¢ a net ton of coal handled by it as the sales agent of the Enterprise Coal Mining Company under a contract between plaintiff and the White Star Coal Company (see findings 6 and 10). The only claim ever made to the Government in connection with this 23¢ a ton, which plaintiff claims herein was an increased cost resulting from enactment of the N. I. R. A., was made by the White Star Coal Company to the War Department, not under the act of June 16, 1934, *supra*, but under the White Star Company's contract with the Government (see finding 8).

Under the terms of the proviso in section 1 of the act of June 28, 1938, quoted in finding 9, we do not have jurisdiction to hear and determine the claim presented by plaintiff.

The petition must be dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge*, and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

NILS P. SEVERIN, AS SURVIVING PARTNER OF NILS P. SEVERIN AND ALFRED N. SEVERIN (NOW DECEASED), FORMERLY COPARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF N. P. SEVERIN COMPANY v. THE UNITED STATES

[No. 44621. Decided June 7, 1943. Defendant's motion for new trial overruled October 9, 1944]

On the Proofs

Government contract; delay by defendant.—Contractor is entitled to recover for loss sustained on account of unreasonable delay caused by defendant's procrastination and stoppage of work on defendant's orders.

Same.—Evidence is insufficient to establish that, except for delays caused by defendant, contract would have been completed in a shorter period than the actual contract time.

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *Mr. Harry D. Ruddiman* and *King & King* were on the briefs.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Nils P. Severin and Alfred N. Severin during all times herein mentioned were citizens of the United States and residents of Illinois and copartners doing business under the name and style of N. P. Severin Company, with their principal place of business in Chicago, Illinois. The partners have had a long and extensive experience in the construction business.

On July 8, 1941, Alfred N. Severin died testate, and an executor of his will was duly appointed. Since July 8, 1941, Nils P. Severin has been and now is the surviving partner of the former copartnership, and as such entitled to prosecute this suit. As used herein the term "plaintiff" refers to the partners, the partnership, or the surviving partner, interchangeably as the context may require.

2. May 25, 1931, the N. P. Severin Company, the partnership consisting of Nils P. Severin and Alfred N. Severin, entered into a contract with the United States, through the Treasury Department, by Ferry K. Heath, Assistant Secretary of the Treasury, to furnish all labor and materials, and perform all work required for construction complete of main hospital building, residence of Medical Officer in charge, four double houses for Junior Medical Officers, Attendant's quarters, garage, outside mechanical service lines, approaches, retaining walls and grading of site at the United States Marine Hospital, Seattle, Washington, in strict accordance with the specifications, schedules, and drawings, for the consideration of $1,269,900.

The contract is plaintiff's exhibit 1, and the specifications are plaintiff's exhibit 2. These exhibits are made a part of this report by reference.

3. The contract provided for the work to be commenced as soon as practicable after the date of receipt of notice to proceed and to be completed within 500 calendar days thereafter. Notice to proceed was given June 18, 1931, which fixed October 30, 1932, as the completion date of the contract. Actual construction on the site began about July 22, 1931.

The Government began moving into the hospital building between the 10th and 15th of December 1932, and the hospital building was pretty well equipped by the end of December 1932. The contract, except for adjustments which are usual in buildings of this kind, was completed January 15, 1933.

Delays caused by the defendant extended over the period from January 23, 1932, to August 12, 1932. Plaintiff was given a time extension of 30 days in a letter dated January 26, 1933, hereinafter set out in finding 16. Plaintiff was given a further time extension of 90 days in a letter dated May 25, 1934, hereinafter set out in finding 17.

4. The hospital building is a 14-story reinforced concrete structure with brick outside walls and concrete floor slabs, with the necessary plumbing, heating, and interior finish and trimming. It contains operating rooms, patients' rooms,

various hospital offices, etc., and a very large amount of mechanical work for its size, as is usual in hospital buildings. As provided in the original drawings and specifications the 10th, 11th, and 12th floors of the hospital building were designed for living quarters for nurses.

5. In the construction of this large hospital building there were many different operations carried on by different subcontractors, and different crews or trades of workmen, consisting of making the necessary excavations, the construction of concrete foundations, the pouring of concrete floor slabs, the erection of outside brick walls, etc. The so-called inside work consisting of partitions, plastering, floors, inside trim, etc., was also carried on by different crews of workmen. As the floors and partitions were constructed roughing in of mechanical work was done consisting of plumbing and heating, electrical work, and special equipment. All the work was planned and organized so the different operations from the foundations through each of the stories to the roof of the building would be carried on by the trades of workmen in a continuous, orderly, and expeditious manner.

6. September 22, 1931, plaintiff was advised by defendant's associate architects that "the arrangement of the 10th, 11th, and 12th floors will probably be changed and suggest that you not proceed with any work on these floors awaiting further instructions."

November 10, 1931, plaintiff asked information concerning the changes on the 10th, 11th, and 12th floors of the main hospital building, and added:

> In order that this material will be ready at the proper time, it is necessary that fabrication be started at some time in the near future, and if you have any information at this time regarding changes on these floors, we would appreciate receiving same as promptly as possible.

On December 28, 1931, defendant wrote plaintiff a letter as follows:

> Owing to the proposed changes of the upper floors of the Main Building and the construction of the Nurses Home upon the site of the Marine Hospital, Seattle, Washington, it will be necessary to install another boiler in the present boiler room.

> I hereby request that, as directed, a portion of the exterior north wall of the boiler room between columns No. 118 and 121 be left open for the installation of the additional boiler.

7. January 15, 1932, the plaintiff was directed to "discontinue work affected" and on January 23, plaintiff received a letter from the construction engineer relative to the contemplated changes on the 10th, 11th, and 12th floors, the second paragraph of which reads as follows:

> You are directed to discontinue all work, from this date, that will be effected by these changes. This includes all work above the under side of the tenth floor slab.

January 26, 1932, plaintiff wrote defendant as follows:

> This order caused considerable delay in the pouring of the concrete on the tenth floor, and until definite action is taken, will cause additional delays in the field force, rental of equipment, etc., due to the almost entire cessation of electrical and mechanical work, and all other trades on these floors, with the exception of the concrete frames.
>
> It will be necessary for us to include in any proposal covering changes on these floors, the additional overhead and equipment expense for this break in the continuity of the progress of the job.

8. As heretofore stated the original drawings and specifications designed the 10th, 11th, and 12th floors for nurses' quarters. At the time of the correspondence just referred to, defendant contemplated using these floors for hospital purposes instead of nurses' quarters and the building of a nurses' home. This also included the installation of an additional boiler in the basement of the building to heat the proposed new home for nurses and some resulting changes on the 9th floor. At the time plaintiff did not have definite directions and drawings for the changes that were being contemplated by the defendant.

9. January 27, 1932, plaintiff received from the construction engineer instructions "in regard to proceeding with the structural concrete by installing the necessary, extra conduit, pipe sleeves, changes in stairway, etc., as per preliminary drawings for the 10th, 11th, and 12th floors." This permitted

plaintiff to go ahead on a small amount of the mechanical roughing in on the 10th, 11th, and 12th floors. During the months following a great many letters and telegrams were exchanged between plaintiff and defendant in regard to the contemplated changes. Plaintiff repeatedly complained that the delays were causing him great damages and insisted upon definite instructions to proceed.

10. June 8, 1932, defendant ordered plaintiff to proceed with the changes on the 10th, 11th, and 12th floors at cost plus 10 percent overhead and 10 percent profit, the total not to exceed the amount in a prior proposal of plaintiff, and granted extension of time for completion by 60 days.

June 9, 1932, plaintiff requested defendant for an interpretation of costs as used in the order to proceed and for information as to inclusion of cost and overhead already incurred due to delays because of stoppage of work for the last five months.

11. June 11, 1932, the Assistant Secretary of the Treasury sent plaintiff a telegram which reads:

> Reference Seattle Washington Marine Hospital and changes tenth 11th and twelfth floors accordance specifications March fifteenth and drawings therein three separate authorizations this work dated June eighth to proceed on cost plus ten and ten are hereby cancelled work to be installed accordance with contract as previously made.

12. From June 14, 1932, until July 18, 1932, many telegrams and a few letters were exchanged. Plaintiff wanted specific instructions, concerning among other things, the boiler which was to be installed to furnish heat for the contemplated new home for nurses, removal of work on the 10th, 11th, and 12th floors installed for the contemplated changes, the damages plaintiff was suffering on account of the delays, etc.

13. August 4, 1932, the construction engineer wrote plaintiff as follows:

> Reference is made to verbal order to cease certain branches of work in connection with the 10th, 11th, and 12th floors pertaining to your contract for the Marine Hospital, Seattle, Washington.

> This letter may be construed as official authority to cease all extra work that was necessary to get back to the original contract drawings as outlined by me on the 10th, 11th, and 12th floors, until further notice from the Supervising Architect or through this office.

This action on the part of the construction engineer arose from the fact that plaintiff questioned his authority to direct extra work necessary to get back to the original designs for the 10th, 11th, and 12th floors.

14. August 12, 1932, the construction engineer wrote plaintiff as follows:

> Reference is made to the stop order issued by me Aug. 4, 1932, on certain branches of the work on the 10, 11, 12 floors in connection with your contract for the Marine Hospital, Seattle, Wash.
>
> I have received instructions from the Treasury Department to have you proceed in accordance with my instructions with least changes possible with the necessary work on the 10, 11, and 12 floors, to comply with the original contract.
>
> This letter is your authority to proceed.

15. August 8, 1932, workmen of the building trades on the job went on a strike. The strike continued until September 6. The plaintiff requested and obtained an extension of time of 28 days therefor.

16. In furtherance of the contemplated change of the upper stories to purely hospital uses rather than quarters for the nurses, defendant's engineer had ordered plaintiff to proceed with the installation of extra conduit, pipe sleeves, and changes in stairways. This extra work was done by the plaintiff and the plaintiff submitted its cost figures November 30, 1932, to the Supervising Architect of the Treasury stating:

> This work has been completed at an extra cost of $1,743.86, and we respectfully request that we be allowed an addition to the contract price of the sum of $1,743.86, and an additional thirty days in contract time to compensate for delay in progress of the work, caused by our failure to receive the tentative plans at the proper time.

The validity of this order was recognized by the Assistant Secretary of the Treasury who on January 26, 1933, issued to the plaintiff the following determination and order:

> In connection with the construction of the Marine Hospital at Seattle, Washington, reference is made to the authority to the Engineer on January 26, 1932, to order you to proceed with the installation of extra conduit necessary, pipe sleeves, changes in stairways, etc., in connection with the changes of the upper stories, at a cost not to exceed $2,000.00.
>
> Under date of December 6 the Engineer forwarded your proposal dated November 30, 1932, with itemization attached, in amount $1,743.86, for this work, which had been checked and found correct.
>
> You will, therefore, be paid for this extra work the sum of one thousand seven hundred forty three dollars and eighty six cents ($1,743.86) from the appropriation "Marine Hospital, Seattle, Washington."
>
> The Engineer verifies your statement that you have been delayed in the progress of your work because of this extra, and it is considered equitable to allow you thirty (30) additional days, due note of which will be made at time of final settlement.

The extension of 30 days so given was to cover a delay due to the defendant's order to stop work on the upper stories and failure to order resumption of work within a reasonable time thereafter.

17. February 4, 1933, in response to a request therefor, the plaintiff submitted to the Supervising Architect, Treasury Department, a proposal in the sum of $13,682.88 for the changes necessary to return to the original contract requirements covering the upper stories, coupled with the following request:

> These changes have involved a delay in the progress of the work, and we further request that there be made, to the period of contract time, an extension of ninety days.

The defendant objected to the amount of the proposal as too high, and it was, on the insistence of the defendant, revised May 7, 1934, to $5,974.36, with the statement:

> This proposal involves an extension of time to the contract of ninety (90) calendar days, as mentioned in our proposal of February 4, 1933.

May 25, 1934, the Director of Procurement addressed plaintiff by letter as follows:

> In connection with your contract for the construction of the Marine Hospital, at Seattle, Washington, on August 10, 1932, the Engineer was authorized to expend not to exceed $7,000.00 to have you make changes necessary to construct the upper stories as originally planned, the cost to be charged as an addition to your contract, and an itemization to be furnished by you upon completion of the work.
>
> These changes have formed the subject of voluminous correspondence and finally, under date of May 7, 1934, you submitted the revised total requested for the cost of the work, in amount $5,974.36, with 90 days additional for the delay. This final revised figure eliminates the $536.80 for masonry work which was not considered a just charge, and which appeared in your itemization of February 6, 1934, referred to in your revised proposal. Therefore, eliminating the item of masonry from your total of the items, and taking the usual 10% and 10% on the difference, gives the net amount mentioned in your letter of May 7, 1934, or Five Thousand Nine Hundred Seventy-four Dollars and Thirty-six Cents ($5,974.36) as the cost of the work ordered in, which is approved as an addition to your said contract, payment therefor to be made from the appropriation "Marine Hospital, Seattle, Washington."
>
> The ninety (90) compensating days which you also request on account of the delay incident to these changes are approved, as the records indicate on April 2, 1932, you were first asked for a proposal for changes on the tenth, eleventh, and twelfth floors, with which you were proceeding until August 4, 1932, when you were ordered to stop, and you were not given the order to proceed with the work in accordance with the original plans until August 12, 1932, when the Engineer transmitted the instructions sent him in the letter of August 10, 1932, above referred to.
>
> It is noted you call attention to the fact that your proposal does not include any monetary amount for the cost of delays incurred, and you make the proposal with the understanding that it does not prejudice your right to appeal to the Comptroller General for the cost of the delays. While your contract provides for compensating time for each day you are delayed by the Government or for causes beyond your control, it does not pro-

vide for reimbursement for any cost because of such delay; but you have the right to submit a claim for same, if you desire, direct to the Comptroller General.

The extension of time granted in this order, of 90 days, was intended to cover the delay created by the stop order, and not to the time necessary to perform extra work required by the order of May 25, 1934, for which compensation was provided.

The sum of $5,974.36 was made up as follows:

Plastering	$2,185.15
Electrical	1,974.83
Plumbing and Heating	260.85
General	516.66
	4,937.49
10% overhead	493.75
	5,431.24
10% profit	543.12
	5,974.36

Included in the first proposal was an item of $5,289.00 for three months of delay, being job overhead of $1,763.00 per month. This item was not acceptable to the defendant, and it was not allowed in the order of May 25, 1934.

18. June 22, 1935, the plaintiff submitted to the Comptroller General a claim for damages caused by delays heretofore mentioned in the amount of $5,289.00.

December 7, 1937, the Comptroller General by letter disallowed plaintiff's claim.

19. There is no satisfactory proof that plaintiff would have completed the contract before November 27, 1932, had there been no stop orders. There is no evidence of delay upon the part of the plaintiff that would have extended the time of performance beyond the contract date as extended by the 28 days allowed for the strike. But for the stop orders plaintiff could and would have completed the contract by November 27, 1932. As heretofore found, the contract was actually completed January 15, 1933, an overrun of 49 days.

As a result of the delay of 49 days, for which the plaintiff was not at fault, the plaintiff incurred additional costs as follows:

(a) *Supervisory employees.*—The increased cost of the supervisory employees on the job at Seattle, Washington, for 49 days amounts to	$2,321.62
(b) *Cost of equipment—rental basis.*—There are various items of equipment on which plaintiff claims rental. All this equipment, except 7 or 8 items, was owned by the plaintiff. The increased cost of equipment on a rental basis for 49 days amounts to	623.60
(c) *Cost of sand and gravel.*—The increased cost incurred in operating the sand and gravel pit for 49 days amounts to	785.47
(d) *Cost of Katz & Lewis Plumbing Co.*—Katz & Lewis Plumbing Co., plaintiff's subcontractor for plumbing and heating on the job, has filed with plaintiff a claim for increased cost due to delays. Plaintiff has not paid the subcontractor anything on the claim, but does express an obligation to reimburse the subcontractor for any sum recovered. The increased cost to the subcontractor for supervisory employees on the job for 49 days of delay that it experienced amounts to	3,037.39
(e) *Cost of light and power.*—Increased cost of light and power for 49 days amounts to	109.27
(f) *Cost of check tax.*—A check tax went into effect June 21, 1932. From September 15, 1932, to November 27, 1932, the increased cost due to the check tax amounts to	6.18
(g) *Cost of water.*—The increased cost of water for 49 day amounts to	32.10
(h) *Cost of Chicago office overhead.*—The increased cost of the Chicago office overhead allocated to the Seattle job for 49 days amounts to	3,234.00
(i) *Cost of photographs.*—Increased cost of progress photographs for the extended period of 49 days amounts to	11.27
Total	10,160.90

Other items claimed as increase of cost are not evidenced by satisfactory proof.

Plaintiff has not been paid or reimbursed by the defendant the whole or any part of this sum of $10,160.90.

20. The changes proposed by the defendant were not reasonable or within the contemplation of the parties when the contract was executed.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant to "furnish all labor and materials, and perform all work required for construction complete of main hospital building, residence of Medical Officer in charge, four double houses for Junior Medical Officers, Attendant's quarters, garage, outside mechanical service lines, approaches, retaining walls, and grading of site at the United States Marine Hospital, Seattle, Washington, for the consideration of one million two hundred sixty-nine thousand nine hundred dollars ($1,269,900.00), in strict accordance with the specifications, schedules, and drawings, * * *." The contractor agreed to commence work as soon as practicable after date of receipt of notice to proceed and to complete the work in 500 calendar days thereafter. Notice to proceed was given June 18, 1931, which fixed the completion date as October 30, 1932.

The contract was completed on January 15, 1933. Delays caused by the defendant extended from January 23, 1932, to August 12, 1932.

Plaintiff was given an extension of time of 120 days with an extension of 28 days for a strike which occurred near the end of the completion of the work. There is no claim for any damages for the period extended by reason of the strike.

Plaintiff claims damages by reason of the fact that the defendant stopped the work on this fourteen-story building from the tenth floor up. The tenth, eleventh, and twelfth floors were to be nurses' quarters.

In the middle of January, 1932, the defendant contemplated placing the nurses' quarters in a separate building and ordered all work stopped on all floors "above the under side of the tenth-floor slab." On June 8, 1932, plaintiff was formally ordered to proceed with the changes on the tenth, eleventh, and twelfth floors from nurses' quarters to hospital quarters. Plaintiff meanwhile had been instructed to

and had done some of the work required by the order of June 8, 1932. Then came the order cancelling the order of June 8, 1932. For the work already done the Assistant Secretary of the Treasury issued an order January 26, 1933, allowing plaintiff extra compensation of $1,743.86 and 30 days' extension of time.

But the work so done, or at least a part of it, had to be undone because the defendant decided to go back to the original plans. To cover this reversion to the original plans defendant issued a second change order, May 25, 1934, long after the changes back and forth had been made, increasing the contract price by $5,974.36 and extending the time by 90 days.

This second change order required the taking out of the work which had previously been done under the first change order and the installation of other equipment.

However, while defendant was making up its mind from the day of the "stop order" on all work above the "tenth-floor slab" until the time defendant decided to return to the original plans to have the tenth, eleventh, and twelfth floors for nurses' quarters, as provided for in the original contract, the plaintiff was delayed by the nonuse of its equipment, the idleness of its supervisory employees, rental cost of equipment, and extra costs of operating its sand and gravel pit, and the extra costs to its subcontractor, Katz & Lewis Plumbing Company.

Due to defendant's procrastination and its inability to decide definitely what it proposed to do with reference to the three floors mentioned, plaintiff's extra costs were all in addition to the work which was performed under the change orders.

These change orders were purely and solely for the actual cost of the extra work, and the conduits, pipe sleeves, and stairways, and had nothing to do with the delay in the course of the erection of the building above the tenth floor and to the roof of the fourteenth floor.

Although defendant extended the time 120 days, as a matter of fact plaintiff did not use this number of days in the completion of its contract but was able to complete in

49 days after November 27, 1932, the new date allowed for the 28 days' strike.

The amounts sued for are not for extra material outside of the amounts allowed in the change orders, but are for idleness of plaintiff's force, office supervision, rental of equipment, etc., substantially all being in the nature of overhead.

Plaintiff has sustained a loss by reason of the stoppage of the work on the floors above the ninth floor of the building for which the defendant is responsible and liable for damages.

Plaintiff contends that the contract would have been completed in a shorter period than the actual contract time but the evidence is not sufficient to support this contention.

There are other items of cost claimed by the plaintiff but we do not think they are sufficiently proved.

In our judgment plaintiff is entitled to recover for 49 days' delay, the actual delay beyond the contract period, in the sum of $10,160.90.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE CEM SECURITIES CORPORATION v. THE UNITED STATES

[No. 45321. Decided May 1, 1944]

On the Proofs

Income tax; deduction of bad debt.—Where plaintiff in 1932 loaned to one Utech $115,500 on Utech's unsecured demand note in order to enable Utech to make payment on a bank note secured by stock of a corporation in which plaintiff was the principal stockholder, so as to prevent the public sale of the stock and to maintain the market therefor; and where in 1933 the bank called Utech's loan and sold the collateral, including the stock in the price of which plaintiff was interested, and returned to Utech the unsold collateral and also the excess money obtained from the sale; and where Utech used and lost

this money in the stock market and made no payment on the note held by plaintiff, and has made no payment since; it is *held* that plaintiff, having in 1933 charged off the Utech note as worthless, is entitled to the deduction as of a bad debt in plaintiff's income tax return for 1933.

Same; date when loss on note was ascertainable.—In 1932, when the unsecured note was taken from Utech, there was the apparent probability that Utech might be able to pay it, which was sustained by subsequent events, since if the bank had not forced a sale of the collateral at the particular time it did, the subsequently increased market value of the colateral would have more than liquidated both his note to the bank and his note to plaintiff, so that the Utech note could not have been considered a bad debt in 1932.

Same; option to purchase stock at fixed price less than market value; combination of gift and sale.—Where plaintiff, the principal stockholder of a corporation in the stock of which plaintiff continuously traded, in 1932 gave to one Amberg an option to purchase 1000 shares of the stock at $10 per share; and where in 1933 Amberg exercised his option and bought at $10 per share 1000 shares, the then market value of which was $22.75 per share on the Stock Exchange; it is *held* that plaintiff was entitled to a deduction in its income tax return for 1933 of the difference between the cost of the stock, $42,369.13, when it was acquired in 1929, and the price at which the stock would have sold on the Exchange on the day of the sale to Amberg, which was $22,750, or $22.75 per share, as held by the Commissioner, and plaintiff is not entitled to recover.

Same.—The option given by plaintiff to Amberg was a combination of a promise to sell and a promise to make a gift, and the transfer was a combination of sale and gift; and to the extent to which the transfer was a gift it did not represent a business loss to the plaintiff but an intentional donation to Amberg no matter what was the motive therefor.

The Reporter's statement of the case:

Mr. J. Marvin Haynes for the plaintiff.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff was organized December 5, 1921, under the laws of the State of New York, and on February 21, 1928, was changed to a Delaware corporation.

For many years prior to 1921, Charles E. McManus, the principal stockholder of plaintiff, was engaged, among other things, in inventing various mechanical devices and processes, in purchasing and developing such devices and processes, and in leasing them on a royalty basis. Upon its organization in 1921 plaintiff took over those activities and it has continued in that business as well as that of a management corporation. From time to time plaintiff has also bought and sold securities. In connection with these activities plaintiff made loans on various occasions from December 5, 1921, to December 31, 1933, in the aggregate amount of more than $2,000,000. Most of these loans were made without collateral.

2. The common stock of plaintiff consisted at all times of 100,000 shares of no par value, all of which was owned by plaintiff's president, Charles E. McManus. Its preferred stock consisted of 74,100 shares of a par value of $30 per share, 40 percent of which was owned by McManus and 60 percent by his wife and sons.

3. Plaintiff controlled the Crown Cork & Seal Co., Inc. (hereinafter referred to as the "Crown Company"), and its affiliates. The Crown Company had common capital stock outstanding on the dates indicated as follows:

Date	*Shares*
December 31, 1930	302,116
December 31, 1931	384,122
December 31, 1932	384,162
December 31, 1933	384,237

On the same dates plaintiff owned the following shares of common capital stock of the Crown Company:

Date	*Shares*
December 31, 1930	147,674 1/5
December 31, 1931	160,440 4/5
December 31, 1932	146,540 4/5
December 31, 1933	131,480 4/5

Charles E. McManus did not own personally any stock in the Crown Company.

4. In 1929 John J. Utech purchased 2,200 shares of the common stock of the Crown Company at prices ranging downward from about $60 or $70 per share. At the time the purchases were made Utech was a close personal friend of

Charles E. McManus and also of Leroy W. Baldwin, president of the Empire Trust Company. In making the purchases Utech relied largely on the recommendation of McManus as to the character of the stock and its future prospects, and when the market value of the stock later declined, McManus urged Utech not to worry about his purchases of Crown stock and stated he was confident that it would later increase in price, though McManus did not at any time guarantee to save Utech harmless from loss on account of his purchases.

5. In connection with the purchase of the above stock, Utech borrowed money from the Empire Trust Company and pledged the 2,200 shares of Crown stock as security for the loan, which amounted to approximately $147,000. January 6, 1930, when the Crown stock had declined in value and the Empire Trust Company was asking for additional collateral as security for the loan, plaintiff loaned to Utech 1,000 shares of common stock of the Crown Company, which was put up as additional collateral on the loan with the Empire Trust Company. September 26 and December 15, 1930, and June 15, 1931, plaintiff made further loans of additional shares of the common stock of the Crown Company in the respective amounts of 500, 1,000, and 3,000 shares for the same purpose and these shares were deposited with the Empire Trust Company as additional collateral for the loan to Utech. On June 15, 1931, when the last loan of stock was made by plaintiff to Utech, the loan of Utech with the Empire Trust Company amounted to $147,537.56 and it was secured by 7,700 shares of common stock of the Crown Company, 2,200 shares of which were owned by Utech and 5,500 shares by plaintiff and loaned to Utech as shown above. At the time these loans were made by plaintiff, the Empire Trust Company was threatening to sell the stock then held as collateral for Utech's loan and plaintiff did not desire to have Utech's stock placed on the market because of the adverse effect it would have on the market price of Crown stock.

6. In confirmation of the understanding had when the stock was loaned by plaintiff as shown above, an agreement was entered into between Utech and plaintiff on July 22,

1931, with respect to the total loan of 5,500 shares, which read, in part, as follows:

> Now, THEREFORE, it is understood and agreed that The CEM Securities Corporation has pledged the above shares as collateral for the account of JOHN J. UTECH, with the understanding that the loan above referred to of $147,537.56 is a separate and distinct loan on Crown Cork & Seal Company, Inc., Common Stock, and
>
> FURTHER, that the said JOHN J. UTECH hereby states and confirms that the above-mentioned 5.500 shares are the property of and are owned by The CEM Securities Corporation, and the said JOHN J. UTECH has no personal interest in said shares, and his heirs, executors, or administrators shall have no right or interest in the above-mentioned shares; it being agreed between the parties hereto that the shares totaling 5,500 are simply pledged with the Empire Trust Company as collateral for the accommodation of John J. Utech, and
>
> It is further understood that as the loan is liquidated, such shares as are released are to be forthwith returned to The CEM Securities Corporation.

When the above agreement was entered into, the Crown Company was quoted on the New York Stock Exchange at approximately $21 per share, which represented a value for the 7,700 shares of some $14,000 in excess of the Utech loan with the Empire Trust Company.

7. By April 1932 the price of the Crown Company stock had declined to between $8 and $11 per share on the basis of which the market value of the 7,700 shares of that stock which was pledged as security for the Utech loan was some $75,000 less than the amount of the loan. Because of that situation and because bank examiners were insisting that adequate security be shown for the loan, on April 11, 1932, the president of the Empire Trust Company telephoned to McManus, president of plaintiff, who was then at Nice, France, and demanded that plaintiff deposit additional collateral to secure the Utech loan. The president of the bank asserted that plaintiff had agreed to keep the loan adequately secured, but plaintiff denied the existence of any such agreement and refused to deposit any additional collateral. As a result of an exchange of cablegrams, further action in con-

nection with the note was held in abeyance pending the return of McManus to the United States. After the return of McManus, the Empire Trust Company continued to make demands upon plaintiff for additional collateral. Plaintiff refused to make any additional deposits and continued to deny the existence of any agreement to furnish such additional collateral.

8. November 7, 1932, Utech wrote McManus as follows:

> I am very sorry, indeed, at feeling compelled to inform you of the notice I received from the bank by registered mail Saturday, calling my loan for $147,537.56 plus accrued interest, or a total of $150,679.07, secured by 7,700 Shares of Crown Cork and Seal Company stock, at 10 A. M. November 7th.
>
> I succeeded in reaching Mr. Nagel, who suggested that I also notify Mr. Buckner, which I did. I later 'phoned Mr. Baldwin, who told me that he was forced to sell out the loan by the Banking Department, unless it was sufficiently secured. I told him of my plight, and of your serious illness, at which he expressed sorrow, but informed me that unless the loan was sufficiently margined it would have to be closed out.
>
> He suggested Saturday, that I see him on Monday, which I did, and he reiterated the position that he was helpless in the matter. I wanted to call you on the 'phone today, but Mr. Nagel thought it best not to—that he would see you tomorrow, but, somehow, I feel it my imperative duty to notify you first hand, inasmuch as your securities in jeopardy.
>
> I cannot tell you how depressed and sorry I feel that this condition has come about, when I realize my utter helplessness in the circumstances, more especially when you are still in the hospital, bedfast with the second major operation in a year.
>
> Have you any suggestion of any procedure for me to take with the bank in the premises, as it certainly seems a shame to face the prospect of losing this stock, when all conditions point to so much good immediately ahead. Is there not some way you can protect the position and save your stock?

At the date of the above letter the Utech note with accrued interest amounted to $150,679.07, and at that time the Crown Company common stock was quoted on the New York Stock Exchange at approximately $21 per share,

which made a total market value for the 7,700 shares of Crown stock pledged as collateral of approximately $161,700. At the same time Utech had another note with the same bank for $25,000 which was in no way connected with the other loan, and this note was secured by 1,000 shares of common stock of International Petroleum Company, 33 shares of common stock of General Baking Corporation, 70 shares of common stock of U. S. Steel Corporation, and 500 shares of common stock of Chrysler Corporation, which had a total fair market value in November 1932 of $23,520.75. All of this stock (with the exception of that of General Baking Corporation, which had a total value at the time of approximately $420 and which was owned by Utech) was owned by Utech's wife, who had endorsed the certificates in blank and delivered them to him to be used as collateral, but Utech did not advise plaintiff or plaintiff's officers of his wife's interest in this stock.

9. Up to November 19, 1932, the Empire Trust Company was continuing its demands on plaintiff as well as on Utech for a settlement of the Utech note on which the Crown Company stock was pledged as collateral. On November 19, 1932, in order to secure the release and return to it of the 5,500 shares of Crown stock which plaintiff had loaned to Utech and to prevent the placing of Utech's 2,200 shares of Crown stock on the market, Utech gave plaintiff an unsecured demand note bearing interest at 5 percent for $115,500, the fair market value of plaintiff's 5,500 shares of Crown Company stock. Thereupon plaintiff gave Utech a check in the amount of $115,500, which was endorsed by Utech to the Empire Trust Company. At that time the Utech note amounted to $150,679.07, and by applying the check of $115,500 referred to above and a cash payment of $10,089.86 made by Utech, the note and accrued interest were reduced to $25,089.21. That balance, together with the amount of $25,000 owed by Utech on the other note referred to above, was consolidated into one note of $50,089.21 with the Empire Trust Company. Utech left with the bank as security for that note the 2,200 shares of Crown Company stock and the other stock referred to above which had been pledged as collateral for the note

of $25,000. At the same time plaintiff's 5,500 shares of Crown Company stock were returned to it by the bank. On November 19, 1932, the fair market value of the securities which were left pledged as collateral for the note of $50,089.21 was $69,720.75. No collateral was given by Utech to plaintiff for the note of $115,500. Plaintiff, however, believed that the market for the securities which were pledged by Utech as collateral for the note of $50,089.21 would improve, and that with such improvement an excess amount would be realized which would be used by Utech to satisfy the demand note of $115,500. There was, however, no agreement between Utech and plaintiff, or notation on the note of $50,089.21, or agreement in connection with the pledging of the collateral, which required that any excess amount realized on the sale of the collateral be applied on the note for $115,500.

10. After the consolidated note had been given by Utech with the collateral set out above, the president of the bank told Utech that he believed the bank examiners would be satisfied with the note and that he would make no further demands on the note unless they forced him to take such action, or the collateral became inadequate. However, in the spring of 1933, the president of the bank informed Utech the bank was forced to make collection of the note in order to improve the liquidity of its condition, and during or shortly prior to June 1933, the bank liquidated Utech's note by selling the 2,200 shares of common stock of the Crown Company and the 33 shares of General Baking stock. The remaining collateral was delivered by the bank to Utech, who in turn delivered it to his wife, to whom it belonged. An amount was realized by the bank by the sale of collateral more than sufficient to satisfy the note of $50,089.21, and that excess was turned over to Utech, who, instead of applying it on the note of $115,500, used it in the stock market in an effort to make a recovery, but without success.

11. Shortly after the liquidation of the Utech note, plaintiff in June 1933, investigated the status of Utech's loan at the bank and learned for the first time that it had been paid and the securities released. In June 1933, the high and low

prices for the stock which had been pledged as collateral were as follows:

Stocks	High	Low
Crown Cork & Seal Co., Inc., Common	63¼	45¼
Chrysler Corp. Common	36⅜	22¼
International Pet. Common	18⅜	13⅞
U. S. Steel Common	60	51
General Baking Corp. Common	19½	15¾

On the basis of the above "high" prices, the total amount realizable in June 1933, from the collateral securing Utech's note of $50,089.21 was $180,556.

12. Prior to June 1933, plaintiff had made demands on Utech for the payment of interest, but without success. After it was found by plaintiff that the note of $50,089.21 had been settled and the collateral released, plaintiff made further demands on Utech for the payment of his note of $115,500, which were likewise unsuccessful, and after further investigation came to the conclusion in 1933 that Utech was not financially responsible and that the note could not be collected. Plaintiff did not institute suit at this time, since it was advised that a judgment would be worthless. Further requests for payment were made by telephone at various times over the period from 1934 to 1938, with the same results, and finally, in 1938, when the six-year statute of limitation on collection of a note of that kind was about to run, plaintiff instituted suit for its collection. The suit was dismissed in November 1938 upon execution of a new unsecured demand note for $115,500. That note is still outstanding, and no amount, either of principal or interest, has ever been paid on the original note or the new note.

13. In 1933 plaintiff charged off the note of $115,500 on its books of account as a bad debt and took a deduction therefor in its income-tax return for 1933. Except for the stock pledged as collateral for the loan of $50,089.21, Utech's financial position was substantially the same throughout 1933 as in the years immediately prior thereto, when he had no real or personal property which was available for the payment of his indebtedness to plaintiff, and the same situation

has existed since 1933. During those years, Utech was employed as a manufacturer's representative on a commission basis when the largest amount earned in any one year did not exceed $5,000.

On the basis of market prices prevailing at some period during each of the years mentioned below, a total fair market value for the securities which were pledged as collateral for the loan of $50,089.21 existed as follows:

1933	$200,396.37
1934	147,978.13
1935	198,197.63
1936	316,801.25
1937	338,548.50

14. June 12, 1929, plaintiff acquired 1,000 shares of common stock of the Crown Company at a cost of $42,369.13. In 1932, plaintiff gave an oral option to Max Amberg, a partner of Hyman & Company, members of the New York Stock Exchange, to purchase 1,000 shares of common stock of the Crown Company at $10 per share. At the time the option was given, the Crown Company stock was selling on the market at $10 per share. March 20, 1933, plaintiff sold 1,000 shares of common stock of the Crown Company to Max Amberg for $10,000, in accordance with the aforesaid option. On the date of the sale of the Crown Company stock to Amberg, the stock was quoted on the New York Stock Exchange at $22.75 per share.

At the time of giving the option, plaintiff owned a total of approximately 154,000 shares of the common stock of the Crown Company and traded from time to time in that stock. Exclusive of the 1,000 shares sold to Amberg, plaintiff sold 13,450 shares of the Crown Company stock during 1933 and reported a profit from such sales in its 1933 income-tax return in excess of $200,000. The option was given to Amberg on account of services which he had rendered and would continue to render to plaintiff in publicizing the common stock of the Crown Company and disseminating literature on the activities of the company. There was no arrangement with Amberg or anyone else whereby plaintiff was to be paid in cash or in any way other than by the services mentioned in the preceding sentence, directly or indirectly anything in excess

of the $10,000 which Amberg paid for the 1,000 shares of common stock of the Crown Company and plaintiff did not receive from any source anything in addition to the $10,000, and the services mentioned above.

15. March 15, 1934, plaintiff filed its income and excess profits tax return for 1933 showing taxable net income of $15,396.98 and a tax liability of $2,170.84, which was paid in quarterly installments during 1934. In that return plaintiff claimed as a bad-debt deduction the Utech note of $115,500 heretofore referred to, and a loss of $32,369.13 on account of the exercise by Amberg of the oral option for the purchase of the Crown Company stock; that is, the difference between the cost of the stock to plaintiff, $42,369.13, and the price for which it was sold to Amberg under the option, $10,000.

16. Upon an examination of plaintiff's return for 1933, the Commissioner of Internal Revenue disallowed the bad-debt deduction of $115,500 on account of the Utech note. The Commissioner also reduced the loss on account of the sale of the stock to Amberg by $12,750, thus allowing a loss of $19,-619.13 on the ground that plaintiff's loss should be measured by the difference between plaintiff's cost of that stock, $42,-369.13, and the price on the open market at the date of sale, $22,750. On the basis of that examination the Commissioner made an additional assessment against plaintiff for 1933 of $20,128.66, together with interest of $3,867.46; that is, a total of $23,996.12, and that amount was paid by plaintiff June 9, 1937.

17. June 3, 1938, plaintiff filed a claim for refund for 1933 in the amount of $21,023 on the grounds, among others, that it had suffered a loss in 1933 by reason of the sale of the stock to Amberg under the oral option entered into with him in 1932, and that the Commissioner had erroneously disallowed the bad debt deduction of $115,500 on account of the Utech note.

December 20, 1938, the Commissioner advised plaintiff that the claim for refund would be disallowed, assigning his reasons, in part, as follows:

> It is held by this office that the note of Mr. Utech, who was a personal friend of Mr. McManus, your majority stockholder, was without value when accepted by you in

1932 and the same method used by you in 1933 to ascertain that the loan was bad could have been used by you in 1932 before the loan was made.

You state that your net income should not be increased by $12,750.00, representing additional profit from sale of common stock of Crown Cork and Seal Company to Mr. Max Amberg for the reason that he was given an oral option in 1932 to purchase 1,000 shares of this stock at $10.00 a share and that he exercised this option on March 20, 1933.

It is held that inasmuch as the option was not put in writing, and therefore not binding, the transaction constitutes a sale at the market value of $22.75 a share.

January 25, 1939, the Commissioner formally rejected the claim for refund and notified the plaintiff of such action.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, in its income-tax return for the year 1933, claimed a bad-debt deduction of $115,500 because of a charge-off in that year as worthless of a note of one Utech for that amount which plaintiff held, and a business loss of $32,369.13 occasioned by the sale of 1,000 shares of stock to one Amberg for that amount less than the cost of the stock to plaintiff. The Commissioner of Internal Revenue disallowed the bad-debt deduction entirely, and partially disallowed the loss on the sale of the stock, reducing that loss to $19,619.13. Plaintiff paid the taxes as computed by the Commissioner, filed a claim for refund and, upon its disallowance, brought this suit.

The Government's defense as to the bad debt deduction is that the Utech note, charged off by plaintiff as worthless in 1933, was worthless when made in November 1932, and that the charge-off should have been taken in that year, if at all. The facts of the transaction are fully set forth in the findings, and a full recital of them will not be given here. In brief they are as follows: In 1929 Utech purchased 2,200 shares of common stock of the Crown Cork and Seal Company, which company was controlled by plaintiff. Utech was a close personal friend of Charles E. McManus, the principal stockholder of Crown, and of Leroy W. Bald-

win, president of the Empire Trust Company. To make the purchase, Utech borrowed $147,000 from Empire, and pledged the Crown stock as collateral. In January 1930 the Crown stock had declined in value, Empire was calling for additional collateral, and plaintiff loaned Utech 1,000 shares of Crown which Utech pledged to Empire. Later in 1930 and in 1931 plaintiff loaned, at various times, a total of 4,500 additional shares of Crown to Utech for the same purpose. Plaintiff was the owner of about 150,000 shares of Crown stock during this time, and was interested in maintaining the market price of the stock. It made the additional loans of Crown to Utech to prevent Empire from selling Utech's 2,200 shares, as Empire was threatening to do, because of the adverse effect which such a sale might have had on the market price of the stock.

In 1931 and 1932 the price of the stock continued to decline and by April 1932, all of the Crown stock, 7,700 shares, pledged with Empire on the Utech loan, was worth $75,000 less than the amount of the loan. Empire was demanding additional collateral from Utech and the plaintiff. On November 7, 1932, Utech wrote McManus that Empire had given him notice that it was going to sell the Crown stock and that Utech was helpless to prevent it. The Crown stock was at that time quoted at $21 per share, so that the 7,700 shares had a market value of $161,700. Utech's loan with accrued interest amounted to $150,679.07. Utech had another note with Empire for $25,000, secured by shares of various stocks other than Crown, which in November 1932 had a market value of about $23,000. Most of these stocks belonged to Utech's wife, but the plaintiff's officers were not aware of that fact.

On November 19, 1932, in order to get back its 5,500 shares of Crown stock, and to prevent Empire from putting Utech's 2,200 shares on the market, plaintiff loaned Utech $115,500, the market value of plaintiff's 5,500 shares, on Utech's unsecured demand note bearing interest at 5%. Utech turned the money over to Empire, together with $10,089.86 of his own money, as a payment on his $147,000 note and its accrued interest; thus reducing that note to $25,089.21. That

balance was consolidated with Utech's other note for $25,000, and Utech gave a new note to Empire for $50,089.21, secured by his 2,200 shares of Crown stock and the other stock which had been pledged on his $25,000 note. At this time the market value of all this collateral was $69,720.75. Plaintiff believed that the market price of all these stocks would increase to an amount sufficient for Utech to pay both the Empire note and plaintiff's note for $115,500. At the time this rearrangement of the affairs of Utech, the plaintiff, and Empire was made, Empire's president told Utech that the collateral was now adequate, and that Empire would not make further demands on the note unless the bank examiners compelled it to do so. In the spring of 1933, however, Empire informed Utech that it was compelled to collect his note in order to improve the liquidity of its condition. During or shortly prior to June 1933, it sold Utech's 2,200 shares of Crown, and 33 shares of another stock which was among those pledged to it by Utech, realizing more than enough from these sales to pay Utech's note to it. It returned the unsold collateral to Utech, and also the excess money. Utech used the money in the stock market in an effort to make a profit, but lost the money. During June 1933, that is, within approximately one month after Empire had sold or returned the collateral on the Utech note, the various shares of that collateral were quoted on the Exchange at prices which would have produced a total price of $180,556, or more than enough to pay both the Empire note for $50,089.21 and the plaintiff's note for $115,500. These quoted prices were, in general, maintained or exceeded during the following few years, as is shown in finding 13.

When the plaintiff learned that Empire had sold some of the Utech collateral and returned the rest to Utech, together with the excess cash realized on the sale, it demanded payment of his note for $115,500 to it. Utech made no such payment. The plaintiff then concluded, after further investigation, that Utech was financially irresponsible and that the note was worthless. It charged the note off as a bad debt in 1933. It filed no suit to collect the note at that time, thinking that a judgment would be uncollectible. It made

demands for payment during the years 1934 to 1938, and filed a suit just before the statute of limitations would have run. That suit was dismissed upon the execution by Utech of a new demand note for $115,500 upon which no payments have been made.

We think the plaintiff was entitled to charge off the Utech note in 1933 as a bad debt, and that the Government's claim that the note was worthless in November 1932 when given, is not valid. Utech could not have paid the note in full, at the time he gave it, out of his assets at their then market value. But he did find some $10,000 at that time to pay on his note to Empire, and he left collateral with Empire on his remaining indebtedness to it which was substantially in excess of that indebtedness. He seemed to the plaintiff, therefore, to have resources which could and would be used to make payments on plaintiff's note after the collateral shares had made a further recovery, which plaintiff expected, not unreasonably, that they would do. In fact, if Empire had waited only one month longer to sell the Utech collateral, and had happened to sell it at the high prices of that month, June 1933, the proceeds of the sale and the returned collateral would have considerably more than paid Utech's notes to Empire and to the plaintiff. Since the plaintiff in 1932 expected that these increases would occur somewhat as they did occur, it could not honestly have charged off Utech's debt to it as bad, at that time. In 1933, however, Utech lost his Crown stock, so that he could no longer gain by increases in its market value. He failed to apply the excess cash turned over to him by Empire, to reduce the plaintiff's note. He failed to give the plaintiff the security of the excess collateral which Empire had turned back to him. The plaintiff then concluded that Utech's note was uncollectible, and again subsequent events have shown that that conclusion was correct. We think the plaintiff was entitled to the bad debt deduction which it attempted to take in 1933, and should win that phase of its suit.

As to the sale to Amberg, upon which the plaintiff claimed a deductible loss for 1933, which the Commissioner disallowed, the facts are these. In 1929 the plaintiff bought 1000

shares of Crown stock for $42,369.13. In 1932 the plaintiff gave an oral option to one Amberg, a partner in a New York Stock Exchange firm, to purchase 1000 shares of Crown stock at $10 a share, the price at which the stock was then quoted on the Exchange. No time limit was placed on the option. On March 20, 1933, Amberg called for the stock and it was sold to him for $10,000. On that date Crown stock was quoted on the Exchange at $22.75. When the plaintiff gave the option, it owned 154,000 shares of Crown and was trading from time to time in it. During 1933 the plaintiff sold, in addition to the 1000 shares sold to Amberg, 13,450 shares of Crown and reported a net profit of more than $200,000 from such sales in its income tax return. The reason for the plaintiff's giving Amberg the option was that he had in the past, and the plaintiff expected that he would in the future, publicize the Crown stock orally and by giving out literature concerning it to prospective customers.

The plaintiff in its income tax return for 1933 claimed as a business loss the difference between the $42,369.13 which it paid for the stock in 1929 and the $10,000 which it received from Amberg in 1933. The Commissioner of Internal Revenue determined that the allowable loss was only the difference between the cost of $42,369.13 and the price at which the stock would have sold on the Exchange on the day of the sale to Amberg, which was $22,750, or $22.75 per share. We think the Commissioner was right. When the plaintiff gave to Amberg, without any legal consideration for it, an option to purchase the stock at a fixed price, in the future, it was entering into a bargain from which it could not possibly make a profit, and from which it might, as it did, suffer considerable loss. The plaintiff, as we have seen in our discussion of the Utech note transaction, expected Crown to increase in value, so that it must have anticipated not only a possible, but a probable loss. We think that one who enters into such an arrangement does so with the intention of making a gift to the optionee of the difference between the option price and the readily ascertainable market price at the time the option is exer-

cised. The option is, then, a combination of a promise to sell and a promise to make a gift. And the transfer, when it occurs, is a combination of sale and gift. To the extent to which the transfer to Amberg was a gift, i. e. to the extent of $12,750, it did not represent a business loss to the plaintiff, but an intentional donation by the plaintiff to Amberg. The reason for the donation was that Amberg had done favors for plaintiff in the past and the plaintiff expected that he would continue to do so in the future. This reason, not amounting to legal consideration, is not material. There is always a reason for a gift. It may be affection, relationship, hope of future favors, or something else. But it is still a gift. What we have said disposes of the plaintiff's argument that the uncompensated value of the stock at the time it was transferred to Amberg should be regarded as an advertising cost or business expense, and therefore deductible as such, if not as a loss on the sale of the stock. Here the favors, which were the reason for the gift, had been done for the plaintiff by Amberg during an unspecified number of past years, and were hoped for by the plaintiff for an unspecified time in the future. For this reason, if not for others which we do not stop to discuss, the plaintiff may not charge this portion of its loss as a 1933 business expense.

The plaintiff may recover upon the item of its claim which relates to the Utech note, with interest. Entry of judgment will await the filing of a stipulation as to the amount.

It is so ordered.

WHALEY, *Chief Justice;* and BOOTH, *Chief Justice* (retired), recalled, concur.

WHITAKER, *Judge*, concurring in part and dissenting in part:

I think the plaintiff is entitled to deduct the difference between the purchase price of the stock of the Crown Cork & Seal Company and the price for which it was sold to Max Amberg.

The majority opinion states that there was no consideration for the option given Amberg to purchase this stock at $10.00 a share. This does not seem to me to be true. Amberg had rendered services to the plaintiff in times past and it was desired that he should render services to it in the future in the way of publicizing the stock of the Crown Cork & Seal Company, of which plaintiff was a heavy holder, and in boosting its value. This was the actual and I think a sufficient consideration for the option.

But whether or not the option was legally binding, plaintiff felt itself obliged to honor it in order to induce Amberg to continue to boost the stock; in other words, it felt compelled to sell Amberg the stock for $10.00 a share and it actually did so. Therefore, it is unquestionably out of pocket the difference between what it paid for the stock and what it sold it for.

If a man enters into an unenforceable agreement to sell a piece of property at an agreed price and, although the market for the property advances in the meantime, he nevertheless carries out his agreement merely as a matter of honor, he is bound to take the actual sale price as the basis in determining gain or loss.

Even though it properly can be said that plaintiff gave Amberg the difference between the market value of the stock and the price fixed in the option, I still think plaintiff is entitled to deduct the difference between the cost and the price for which it actually sold the stock, because this, concededly, was done both for his past services in boosting the stock and to induce him to continue to do so. Plaintiff held a great deal of this stock and was constantly trading in it. Keeping up the value of the stock was a part of plaintiff's business, which it thought it could promote by inducing Amberg to continue to boost it. The transaction, therefore, might be viewed in the same light as gifts to customers and the expenses of entertaining them in order to retain their goodwill and business.

The Board of Tax Appeals (now The Tax Court) has held that both gifts to customers and the expenses of enter-

taining them are deductible. *James F. Coleman*, 3 B. T. A. 835; *Adler Co.* v. *Commissioner*, 10 B. T. A. 849; *Flanagan* v. *Commissioner*, 47 B. T. A. 782; *Hartford Hat & Cap Co.* v. *Commissioner*, 7 B. T. A. 714.

The Second Circuit Court of Appeals has held that entertainment expenses are deductible. *Schmidlapp* v. *Commissioner*, 96 F. (2d) 680; *Blackmer* v. *Commissioner*, 70 F. (2d) 255; *Cohan* v. *Commissioner*, 39 F. (2d) 540.

A taxpayer is entitled to deduct a bonus paid employees, not because the corporation was under the obligation to pay the bonus, but because it was done in order to improve the efficiency and productivity of employees. The sale to Amberg at this low price was done for the same reason. Both the Commissioner's regulations and the decisions of the Board of Tax Appeals recognize the right of the taxpayer to deduct bonuses to employees. *Boericke & Runyon*, 3 B. T. A. 684; *Ferry Market, Inc.* v. *Commissioner*, 5 B. T. A. 167; *Ketcham* v. *Commissioner*, 9 B. T. A. 1208; *Liberty Hosiery Mills* v. *Commissioner*, 31 B. T. A. 64; *Guitar Trust Estate* v. *Commissioner*, 34 B. T. A. 857; Regulations 103, sec. 19.23 (a)–8.

Although I think the taxpayer would have been entitled to the deduction as a business expense, it cannot recover on this ground in this case, since it did not base its claim for refund on this ground. *Real Estate Land-Title & Trust Co.* v. *United States*, 309 U. S. 13. However, I am of the opinion that it can deduct it on the ground it asserted in its claim for refund, to wit, as a loss.

I concur in the majority opinion on the deductibility of the bad debt.

LITTLETON, *Judge*, concurs in the foregoing opinion.

In accordance with the above opinion of the court, upon the filing of a stipulation by the parties showing the amount due thereunder to be $18,932.62, with interest as provided by law, and upon plaintiff's motion for judgment, it was ordered October 2, 1944, that judgment be entered for the plaintiff in the sum of $18,932.62, with interest as provided by law.

GREENE COUNTY FARMERS SALES ASSOCIATION v. THE UNITED STATES

[No. 45431. Decided May 1, 1944]

On the Proofs

Income tax; deduction allowed of sums returned to customers in accordance with contract.—A corporation organized for profit, the stock of which was owned by some, but not all, of the members of a farmers' cooperative association, and the by-laws of which provided for a distribution of all of its net profits in excess of 18 per cent to such members of the farmers' associations, whether stockholders or not, as did business with it, in proportion to the business each had done, was entitled in its income tax return to a deduction, as an expense of doing business, of the sums so distributed.

Same; amount received for goods sold reduced by amount of rebates.—The amounts distributed were rebates to purchasers and reduced by so much the total amount received for goods sold.

Same; obligation to pay rebates was an enforceable legal liability.—The rebates were not given to stockholders but only to customers whose contracts entitled them to such rebates; and the obligation to pay such rebates was in each case an enforceable legal liability; and as such the plaintiff was entitled to the deduction as a reduction of the amounts which it in fact received for its goods sold. *Uniform Printing & Supply Co.* v. *Commissioner*, 88 Fed. (2d) 75, *Plymouth Brewing & Malting Co.* v. *Commissioner*, 16 B. T. A. 123, Merten's Law of Federal Income Taxation, Vol. 4, par. 25.111.

Same; deduction as a loss of part of deposit in bank in liquidation not allowed.—Where plaintiff, a corporation, had on deposit a sum of money in a bank which was placed in the hands of a liquidator in 1934; and where during the year 1934 plaintiff was unable to obtain from the Bank Commissioner, or his agent in charge, a statement as to the approximate amount, if any, plaintiff would be paid on final liquidation; it is *held* that plaintiff was not entitled to deduct as a loss any part of the deposit in its income tax return for the year 1934.

Same; statement of liquidator not sufficient to establish loss of bank deposit.—The mere statement of the bank liquidator that he could not then say, in 1934, what amount of plaintiff's deposit would be paid and that probably payment in full would not be made, is not sufficient to establish that the debt was worthless, in whole or in part, in 1934.

The Reporter's statement of the case:

Mr. Howe P. Cochran for plaintiff.
Miss Margaret F. Leurs and *Mrs. Betty Cochran Stockvis* on the brief.
Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.
Mr. Robert N. Anderson and *Mr. Fred K. Dyar* on the brief.

The court made special findings of fact as follows:

1. Plaintiff, a corporation, having its office in Springfield, Missouri, was organized under the laws of the State of Missouri on February 20, 1919. Its charter was amended December 5, 1919, under a state law enacted that year which authorized the organization of agricultural and mercantile cooperative associations. Plaintiff has an authorized capital stock of $40,000, divided into shares of the par value of $10 each. During all of the time material to this action approximately $19,900 of the authorized capital stock was outstanding and was held entirely by 235 of the members of the Missouri Farmers Association.

2. At all times herein mentioned the Missouri Farmers Association was a state-wide organization of some 2,000 farmers. To become a member of the Missouri Farmers Association an applicant had to be eligible under the rules of that organization and pay annual dues. Farmers who dealt with plaintiff and who were members of the Missouri Farmers Association in some instances paid their dues directly to the state organization, and in other instances paid them to plaintiff for transmission to the state office of the Missouri Farmers Association at Columbia, Missouri.

3. Plaintiff's by-laws from 1919 through the taxable years here involved provided that plaintiff's annual net income was to be disposed of as follows: (a) Ten percent to a reserve fund until the fund equaled 50 percent of the outstanding capital stock (the reserve fund reached this amount long before the taxable years in question); (b) a dividend of not to exceed 8 percent to stockholders; (c) the balance of the net income to be distributed to all persons who trans-

acted business with plaintiff who were members in good standing of the Missouri Farmers Association in proportion to the amount of business which each such member had with plaintiff.

4. During the taxable years 1933, 1934, and 1935 plaintiff's business consisted in general of the following: (a) Purchases of farm products from farmers and the resale of such products in the open market, some being sold over the counter to townspeople who were not members of the Missouri Farmers Association, and some shipped for sale in city markets; (b) purchases of goods and supplies in the open market for resale; and (c) a small amount of grain business handled on a cost basis separately from other enterprises as an accommodation to members of the Missouri Farmers Association.

Plaintiff did not restrict its business to members of the Missouri Farmers Association. It dealt with anyone who desired to transact business with it.

5. During the taxable years involved in this action plaintiff's stockholders received an annual dividend from it of 8 percent of the par value of the outstanding stock. This was the maximum dividend to which they were entitled. The balance of plaintiff's net profit was distributed to members of the Missouri Farmers Association in proportion to the total amount of business done with each member. Although plaintiff transacted business with the general public, only those of its patrons who were members of the Missouri Farmers Association shared in the distribution of its surplus profits. Profits which plaintiff realized from business with patrons who were not members were included in the total net profit distributed to members of the Missouri Farmers Association. These distributions were made pursuant to promises made by plaintiff to farmers who did business with it as an inducement to them to join the Missouri Farmers Association and as an inducement to deal with and through the plaintiff.

6. At all times herein mentioned plaintiff kept its books and filed its tax returns on the accrual basis. For the taxable years 1933, 1934, and 1935 plaintiff deducted $7,000,

$6,000, and $3,079.80, respectively, from its gross income in its Federal income tax returns for those years as rebates on purchases made by members of the Missouri Farmers Association.

The Commissioner of Internal Revenue disallowed the deductions to the extent of $2,596.93 for the year 1933, $1,375.88 for 1934, and $1,154.95 for 1935, on the ground that the amounts disallowed were derived from business with nonmembers of the Missouri Farmers Association.

7. Plaintiff had a balance of $8,022.30 on deposit in the Queen City Bank of Springfield, Missouri in 1933 when the Missouri State Finance Department assumed control of the bank and operated it on a restricted basis. The bank was placed in the hands of a liquidator in 1934. During 1933 and 1934 plaintiff was unable to obtain from either the Banking Commissioner or his agent in charge of the bank's liquidation a statement as to the approximate amount plaintiff would be paid on final liquidation of the bank's assets.

In 1933 plaintiff decided to write off the bank deposit over a period of five years. Plaintiff's Federal income tax return for that year claimed one-fifth of the bank deposit ($1,604.46) as a deduction from gross income. The deduction was disallowed on the ground that there had been no charge-off of the amount on plaintiff's books and no ascertainment of the loss.

In 1934 the liquidator of the bank's assets could not give plaintiff a definite statement regarding payment of the account, but he informed plaintiff that he probably would not be able to pay it. Plaintiff decided that the entire account was bad, and in 1934 charged $3,208.92 of the deposit to surplus and credited that amount to a special reserve for loss on the bank account. In its Federal income and excess profits tax return for 1934 plaintiff again deducted one-fifth of the bank deposit from its gross income, but the deduction was disallowed on the same ground as in the previous year.

The deposit was carried on plaintiff's books among its assets during the taxable years in question. In the balance sheets attached to its income tax returns, plaintiff listed the bank deposit as an asset valued at $6,417.84 at the end of 1933, $4,813.38 at the end of 1934, and $4,813.38 at the end of

1935. The special reserve was carried on plaintiff's books during the years 1934 and 1935. In the final liquidation of the bank's assets plaintiff received approximately 12 percent of the bank deposit, but there is no proof as to the year in which the bank made its final payment to plaintiff or as to when the amount of the loss was definitely ascertained.

8. As a result of the disallowances mentioned in the foregoing findings and other adjustments not in dispute, the Commissioner sent deficiency notices to plaintiff showing additional taxes due as follows: for 1933, income tax of $520.99; for 1934, $543.77 income tax and $69.93 interest, and $53.44 excess profits tax and $6.87 interest; and for 1935, income tax of $59.99.

Plaintiff paid the additional taxes as follows: for 1933, $520.99 plus $68.93 interest paid on June 12, 1936; for 1934, $597.21 plus interest of $76.80 paid on May 15, 1937; and for 1935, $59.99 plus interest of $5.23 paid on August 30, 1937. Previously on March 28, 1936, plaintiff had paid $309.69 as income taxes for the year 1935.

9. June 10, 1938, plaintiff filed with the Commissioner claims for refund in the amounts of $357.07 for 1933, $597.21 for 1934, and $369.68 for 1935. In its claims for refund plaintiff contended that it was entitled to deduct from its gross income the entire amount which it distributed to members of the Missouri Farmers Association during each of the three years in dispute. It also contended that it was entitled to deduct 40 percent of the bank deposit ($3,208.92) from its gross income in 1934, but if disallowed for that year that it was entitled to such deduction for 1935.

The Commissioner rejected all of plaintiff's claims for refund on September 11, 1939.

The court decided that the plaintiff was entitled to recover.

Whitaker, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover additional taxes assessed as a result of the disallowance of deductions in both of the years in question of sums distributed by it to members of the Missouri Farmers Association who made purchases from it, and as a result of the disallowance of a deduction of a bad debt in the year 1934.

The Missouri Farmers Association was an organization of Missouri farmers. It had about 2,000 members. Some of them decided in 1919 to organize the plaintiff corporation for the purpose of dealing in agricultural products. It was organized in that year with an authorized capital of $40,000. It offered its stock for sale to members of the Missouri Farmers Association. Of the 2,000 members of that organization, 235 subscribed for stock. An amount of $19,900 of the authorized capital stock was sold.

Plaintiff did business with the public generally, but as an inducement to the members of the Missouri Farmers Association to trade with it, and in order to induce farmers to join the Missouri Farmers Association, plaintiff adopted by-laws providing for a distribution of all of its net profits in excess of 18 percent to such members of the Missouri Farmers Association as did business with it in proportion to the business each had done. After a surplus equal to 50 percent of its outstanding capital stock had been accumulated, it agreed to distribute all its net profits in excess of 8 percent.

The adoption of these by-laws was advertised among the farmers of Missouri, and the members of the Missouri Farmers Association did business with plaintiff on the faith of this promise.

In both of the years in question plaintiff deducted the sums so distributed as an expense of doing business.

We think it is entitled to the deduction. The amounts distributed were rebates to purchasers and reduced by the amount of them the total amount received for goods sold.

This is plain, if we keep in mind that plaintiff was an entity separate and distinct from the Missouri Farmers Association. The moving spirits behind its organization were some of the members of that Association, but all members of that Association did not participate in the organization of nor own stock in plaintiff; only those members of the Missouri Farmers Association who subscribed for stock became stockholders in plaintiff and were entitled to the 8 percent dividend. Plaintiff had 235 stockholders, but there were 2,000 members of the Missouri Farmers Association that did business with it. The Missouri Farmers Association and

plaintiff were separate and distinct entities. Plaintiff was not even a subsidiary of this Association.

These rebates were not given to stockholders, but only to those purchasers whose contract of purchase entitled them to it. Stock holding had nothing to do with one's right to the rebate.

Plaintiff's by-laws promised such rebates to members of the Missouri Farmers Association and these people bought on the faith of this promise and, so, could have enforced the payment of the rebate in a court of law. The obligation to pay it was an enforceable legal liability. As such plaintiff was entitled to deduct it, as a reduction of the amount which it in fact received for its goods sold. *Uniform Printing & Supply Co.* v. *Commissioner*, 88 F. (2d) 75; *Plymouth Brewing & Malting Co.* v. *Commissioner*, 16 B. T. A. 123; *Mertens Law of Federal Income Taxation*, Vol. 4, par. 25.111.

Defendant in its brief refers to several cases dealing with farmers' cooperative associations, but these are inapplicable because plaintiff clearly was not a cooperative, but a corporation organized for profit. The persons to whom the rebates were paid were not "members" of plaintiff—the word used in referring to cooperatives; that they may have been "members" of the Missouri Farmers Association, or of the Knights of Pythias, or of the Methodist Church, makes no difference.

We are of opinion that plaintiff is not entitled to the deduction in the year 1934 of any part of its deposit in the Queen City Bank of Springfield, Missouri. Control of this bank had been assumed by the Missouri State Finance Department in 1933, and in 1934 the bank was placed in the hands of a liquidator, but at no time during the year did plaintiff, nor indeed the liquidator, know whether or not depositors would be paid in full or what percentage of the deposits would be paid. The liquidator informed plaintiff that he could make no definite statement as to the amount they would be paid, and that all he could then say was that he probably would not be able to pay depositors in full. His mere statement that he probably would not be able to pay the depositors in full is not sufficient to establish that

the debt was worthless either in whole or in part. The record does not show when the bank was finally liquidated, but it was sometime after 1935. A total of 12 percent was paid to the depositors.

On the facts we must hold that the debt was not ascertained to be worthless in the year in which a portion of it was deducted and that, therefore, plaintiff is not entitled to the deduction. *Spring City Foundry Co.* v. *Commissioner*, 292 U. S. 182.

The entry of judgment will be deferred until the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report by a commissioner as to the correct amount due plaintiff computed in accordance with this opinion. It is so ordered.

MADDEN, *Judge*; and BOOTH, *Chief Justice* (retired) recalled, concur.

LITTLETON, *Judge*, dissenting in part:

As shown by the findings, the Missouri Farmers Association was a state-wide organization of farmers. Plaintiff was a stock corporation organized under the laws of Missouri to act as business or sales agent of the Missouri Farmers Association. To become a member of the Missouri Farmers Association it was necessary that an applicant be eligible under its rules and regulations and that such applicant pay annual dues to the Association. Plaintiff had no such members. There was no connection between plaintiff's stockholdings and the distribution by plaintiff of patronage dividends in the manner hereinbefore stated in the findings, since a stockholder of plaintiff was not entitled to receive such patronage dividends unless he was a farmer-patron of plaintiff and was also a member of the Missouri Farmers Association.

As used hereinafter the term "member" refers only to patrons of plaintiff who were members in good standing of the Missouri Farmers Association, and the term "non-member" refers to other persons who transacted business with plaintiff.

From the date of its incorporation in 1919 plaintiff's by-laws provided, and so provided during the taxable years 1933 to 1935, inclusive, that all of plaintiff's annual net income was to be distributed as follows: (a) Ten percent to a reserve fund until such fund equaled 50 percent of the outstanding capital stock (the reserve fund reached this amount long prior to the taxable years in question); (b) a dividend of not to exceed 8 percent to plaintiff's stockholders; and (c) the balance of the net income to be distributed to all persons who transacted business with plaintiff who were members in good standing of the Missouri Farmers Association in proportion to the amount of business which each such member had with plaintiff.

During each of the taxable years in question plaintiff paid a dividend of 8 percent to its stockholders and distributed the balance of its net income, as specified in (c) above, to all farmers who transacted business with it who were members in good standing of the Missouri Farmers Association.

Plaintiff did not restrict its business to purchases from and sales to farmers who were members of the Missouri Farmers Association, but it dealt with anyone who desired to do business with it and handled both member and nonmember business on the same basis. However, only those of its patrons or customers who were members of the Missouri Farmers Association shared in the patronage dividends. The profits which plaintiff realized from business done with persons who were not members of the Missouri Farmers Association were included in the total net profits for the year, which it distributed, after payment of the 8 percent dividend to stockholders, as patronage dividends only to farmers who dealt with it and who were members of the Missouri Farmers Association.

Plaintiff does not and, of course, cannot claim exemption from taxation under any provision of the taxing acts as a farmers cooperative association. See sections 103 of the Revenue Act of 1932 and 101 of the Revenue Act of 1934. But it contends that portions of the distributions of its net income remaining after payment of the 8 percent dividend which it made in the taxable years 1933 to 1935, inclusive, to its farmer patrons who were members of the Missouri

Farmers Association, representing net profits which plaintiff made during such years from business transacted with persons who were not members of the Missouri Farmers Association, were rebates paid to such "members" and should therefore be excluded from plaintiff's taxable net income.

Upon the facts in this case I think the distributions in question representing profits derived by plaintiff from transactions with persons or patrons who were not members of the Missouri Farmers Association, which the defendant has determined to be $2,596.93 for 1933, $1,375.88 for 1934, and $1,154.95 for 1935, were not rebates of such character as would justify their allowance as a deduction from taxable income as ordinary and necessary expenses under any provision of the applicable taxing statutes or regulations. The defendant has allowed plaintiff to exclude from taxable income the distributions which it made out of its net income in each of the years in question to farmers who dealt with it and who were members of the Missouri Farmers Association to the extent of the net earnings derived by plaintiff from the business which it did with such "members," and those distributions are not in controversy here.

Rebates or discounts allowed and given to specific customers on transactions specifically with them or to customers generally on transactions with them may, in a proper case, be allowable as deductions in determining taxable net income, (cf. *Uniform Printing & S. Co.* v. *Commissioner*, 88 Fed. 2d 75) but distributions of net profits derived from dealings with certain customers to certain other customers who were in no way connected with the transactions from which such net profits were derived are not rebates or discounts of this character. On the contrary plaintiff's net income was determined after taking into account all expenses and allowable deductions and such net income, from all sources, after payment therefrom of an 8 percent dividend to stockholders, was distributed to a selected group of customers. The taxing acts do not authorize deductions of such distributions in determining taxable income. Claimed deductions from net income which are not authorized specifically, either by the revenue acts or by any regulation applying to them, cannot

be allowed. *Brown* v. *Helvering*, 291 U. S. 193, 205. The allowance of deductions from gross or net income does not turn on general equitable considerations. *Deputy, Administratrix, et al.*, v. *du Pont*, 308 U. S. 488, 493. *White* v. *United States*, 305 U. S. 281, 292.

Upon the record in this case I think the portion of plaintiff's net income in each of the taxable years representing profits earned by it from the business which it did with the public generally, that is with persons or customers who were not members of the Missouri Farmers Association and, therefore, not entitled to participate in any distribution of net earnings, constituted taxable income to plaintiff under the income-tax statutes. *Lucas* v. *Earl*, 281 U. S. 111.

I concur in the opinion of the majority with reference to the bad debt deduction.

I am of opinion that the petition should be dismissed.

WHALEY, *Chief Justice*, concurs in the foregoing opinion.

In accordance with the above opinion, upon the filing of a stipulation by the parties showing the amount due thereunder to be $842.17, with interest as provided by law, and upon plaintiff's motion for judgment, it was ordered October 2, 1944, that judgment be entered for the plaintiff in the sum of $842.17, with interest as provided by law.

THE S. S. WHITE DENTAL MANUFACTURING COMPANY v. THE UNITED STATES

[No. 45763. Decided May 1, 1944]

On the Proofs

Income and undistributed profits tax; loss by reason of abandonment of manufacturing plant for useful purpose.—Where plaintiff, a manufacturing corporation operating a plant at Frankford, Pa., and another at Northwood, a suburb of Philadelphia, Pa., as well as its main plant at Staten Island, N. Y., in 1936 decided, in order to effect operating economies, to erect a new building in connection with its main plant and to remove to it the ma-

chinery and equipment of its Northwood plant; and where upon the completion of the new building in 1937 the machinery and equipment were removed thereto from the Northwood plant, which was thereupon abandoned and not sold until later; it is *held* that in its income and undistributed profits tax for 1937 plaintiff was entitled to a deduction as for a loss, not compensated for by insurance or otherwise, under section 23 (f) of the Revenue Act of 1936, by reason of the abandonment of its Northwood plant.

Same; transaction not a sale of capital asset.—Plaintiff's loss in connection with its Northwood plant was not a loss incurred in the sale of a capital asset, under section 117 (d) of the Revenue Act of 1936, but was salvage of a discarded capital asset, and accordingly the loss is not subject to the $2,000 limitation under section 117 (d).

Same; Treasury Regulations of long standing have the force of law.—Where Treasury Regulations with reference to certain sections of Revenue Acts relating to deduction of losses sustained by corporation and not compensated for by insurance were promulgated as far back as the Revenue Act of 1918, regulations of similar content construing the Revenue Act of 1936 have the force of law. *Helvering* v. *Winmill*, 305 U. S. 79.

Same; interpretation of Treasury Regulations.—The words "change in business conditions," as used in Treasury Regulations relating to deductions by corporation for losses not compensated for by insurance, mean changes "in the opinion of the managers of the business."

Same.—The words "the usefulness in the business of some or all of the capital assets is * * * terminated", as used in Treasury Regulations, mean terminated in whole or in such part that, in the opinion of the managers of the business, good management calls for their being discarded.

Same.—The word "suddenly", as used in Treasury Regulations preceding the word "terminated", relating to deductions by corporation for losses not compensated for by insurance, is a relative word, and was written to contrast with the word "gradual" which appears in the same paragraph; and the language of the whole regulation indicates that it was not intended to be limited to infrequent situations where by legislation or by catastrophe the supply of raw materials, or the market, has been destroyed in a day. See *S. S. White Dental Manufacturing Co.* v. *United States* (No. 44602), 93 C. Cls. 469.

Same.—The words, "proof of some unforeseen cause by reason of which the property has been prematurely discarded," as used in Treasury Regulations relating to losses by corporation not compensated for by insurance, mean only that the cause of its being discarded must have been unforeseen when the asset was

acquired so that depreciation of its cost, on the basis of a short prospective use, would not have been an allowable deduction from income.

The Reporter's statement of the case:

Mr. Harry Levine for plaintiff.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon a stipulation of facts, which was all the evidence adduced:

1. Plaintiff is a manufacturing corporation organized and operating under the laws of the Commonwealth of Pennsylvania, with its principal office at Philadelphia.

2. During 1936 and 1937 plaintiff carried on its manufacturing operations in two plants in Pennsylvania, one at Frankford and the other up to May 1, 1937, at Northwood, and in its plant in the State of New York at Staten Island, in the City of New York.

In 1936 and 1937 the plant at Northwood was in good condition, adequate for plaintiff's manufacturing operations, in an industrial center, within easy access to housing accommodations and other facilities used by employees.

3. At a meeting of the executive committee of plaintiff on April 1, 1936, resolutions were adopted providing for the transfer of operations in the Northwood plant to the Staten Island factory, a new building to be erected at Staten Island at an estimated cost of $170,000 to house the consolidated operations, consideration later to be given to the transfer also of Frankford operations to Staten Island, the ultimate result of the program to effect operating economies estimated at $110,000 a year. The expenses estimated in the resolution for removing operations from Northwood to Staten Island were as follows:

Moving equipment	$16,914
Moving employees	5,000
Rearranging factory activities	2,500
	24,414

The result to be obtained from the removal from Northwood was an estimated annual saving in expense of $30,649.

At a later meeting, May 20, 1936, a maximum price of $178,000 for a new four-story building on Staten Island and $29,800 for a basement was approved.

4. Plaintiff entered into a contract May 22, 1936, for the construction of the new building. Supplemental contracts for supplying and installing special equipment were entered into on July 21, 1936, October 2, 1936 and January 23, 1937. The new plant was completed by April 1, 1937, and all departments of the Northwood plant were moved into it on or before May 1, 1937. Operations at the Northwood plant were thereupon abandoned, the plant was vacated, and it was not thereafter used by plaintiff.

5. Plaintiff's directors in 1936 estimated that the sale or salvage value of the Northwood plant at the time of its expected vacation on April 1, 1937 would be $75,000. A reasonable estimate of its sale or salvage value, April 1, 1937, was $75,560.

In 1936 the Northwood plant was offered for sale and it was actually sold July 1, 1937, for a gross amount of $90,000. Expenses connected with the sale totaled $6,839.50, leaving realized $83,160.50.

6. Plaintiff filed a tentative income and excess profits tax return for the calendar year 1937 on or about March 15, 1938, and filed its completed return on May 11th, 1938, reporting net income of $486,680.03 and total taxes due thereon of $71,115.02. The taxes were paid as follows:

Mar. 15, 1938	$19,000.00
June 16, 1938	16,557.51
Sept. 17, 1938	17,778.76
Dec. 16, 1938	17,778.75

7. Pursuant to the report of a revenue agent, the Commissioner of Internal Revenue increased the plaintiff's net income by $7,800.30, and on January 13, 1939, he assessed an additional tax thereon of $1,966.37, which amount was paid by plaintiff on January 18, 1939.

8. Plaintiff kept its books and filed its returns on an accrual basis of accounting. In its completed return for the year 1937 it claimed a deduction for obsolescence of the

Northwood plant of $23,876.11. This deduction was disallowed as obsolescence, but was allowed to the extent of $2,000 as "loss on sale of capital assets." The deduction of $23,876.11 taken as obsolescence by plaintiff represented one-fourth of the extraordinary obsolescence of $95,504.45 which the plaintiff claimed it suffered when it decided on April 1, 1936, to vacate the Northwood plant on April 1, 1937. The other three-fourths of the obsolescence, namely $71,628.34, it claimed was an allowable deduction for the year 1936, the year of the decision to vacate the Northwood plant. Upon rejection of a claim for refund of taxes paid for 1936 based upon this ground, plaintiff brought suit in this Court (93 C. Cls. 469, 38 F. Supp. 301). This Court found plaintiff was not entitled to recover on the ground of obsolescence.

9. On May 1, 1937, the date of the vacation of the Northwood plant, its cost, less depreciation previously allowed by the Commissioner, was $163,610.71, of which $15,823.38 represented the cost of the land.

10. On or about February 1, 1941, plaintiff filed a claim for refund of the full amount of taxes paid by it for 1937. This claim, after reciting certain facts herein stipulated, stated as a reason for allowance the following:

> (a) The deponent has claimed an allowance for obsolescence for the year 1936 measured by the difference between the depreciated cost of the plant at April 1st, 1936, and its estimated sale or salvage value at April 1st, 1937, the date of its expected abandonment, spread over the period from April 1st, 1936, to April 1st, 1937.
>
> On the basis of cost of the plant, less depreciation permitted for tax purposes, of $170,504.45 and the estimated sale or salvage value of $75,000 at April 1st, 1937, the date of the expected abandonment, deponent suffered obsolescence amounting to $95,504.45. Three-fourths of this amount, i. e., $71,628.34, was claimed as a deduction for 1936, nine out of the twelve months' obsolescence having occurred in 1936. The remainder, i. e., $23,876.11, was claimed on the income tax return of deponent for 1937 but the claim was denied. This denial, deponent claims, was and is erroneous.
>
> (b) In the alternative, the corporation claims the allowance of the complete loss, i. e., $95,504.45 under Section 23 (f) of the Revenue Act of 1936 which permits a deduction in cases of losses sustained and not compen-

sated for by insurance or otherwise. It makes this claim as well under those regulations of the Treasury Department issued under this section and under Section 23 (e) of the Revenue Act of 1936 which are specifically made applicable to corporations.

11. On September 8, 1942, the Commissioner of Internal Revenue rejected the claim and no part of the said amount claimed by the plaintiff has been refunded.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover a part of the income and undistributed profits taxes paid by it for the year 1937. It contends that the stated income upon which these taxes were paid was not its proper taxable income, because no deduction was allowed it by reason of the abandonment, in that year, of one of its manufacturing plants.

The plaintiff carried on its manufacturing operations at three plants located at Frankford, Pennsylvania, Northwood, Pennsylvania, and Staten Island, New York. On April 1, 1936, the plaintiff's executive committee, by resolution, decided to transfer the operations of the Northwood plant to the Staten Island factory, and to build at the latter place a new factory, at an estimated cost of $170,000. The resolution provided for subsequent consideration of the transfer of the Frankford operation to Staten Island. It was estimated that if both these operations should be moved, operating economies of $110,000 a year would be achieved, and that the removal of the Northwood plant alone would cost some $24,000 and would produce annual operating economies of $30,649.

On May 22, 1936, the plaintiff contracted for the construction of the new building at Staten Island, at a cost of about $200,000. That building was completed and all the operations of the Northwood plant were moved into it by May 1, 1937, at which time operations at Northwood were abandoned and the plant there was vacated. It was not thereafter used by the plaintiff.

The plaintiff's directors, when they considered these changes in 1936, estimated that the sale or salvage value of

the Northwood plant when it would be vacated in 1937 would be $75,000, which was a reasonable estimate. They offered the plant for sale in 1936, and sold it on July 1, 1937, for a net sale price of $83,160.50. On May 1, 1937, when the Northwood plant was vacated, its depreciated value, i. e., its cost to the plaintiff less depreciation previously allowed by the Commissioner of Internal Revenue, was $163,610.71.

The Commissioner has treated the plaintiff's loss in connection with the Northwood plant as a loss on the sale of a capital asset, which, though it amounted to the difference between $163,610.71, the cost less depreciation, and $83,160.50, the net price received at the sale, was, under the statute, deductible for tax purposes only to the extent of $2,000, the plaintiff having had no gains on the sale of capital assets against which the loss could be set over. Revenue Act of 1936, Section 117 (d). The plaintiff made a timely claim for refund, which was rejected. The claim for refund was, and this suit is, based upon the proposition that Section 23 (f) of the Revenue Act is applicable, which says that there shall be allowed as a deduction from gross income:

> In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

Since deductions taken for losses which come under Section 23 (f) are not limited to a maximum of $2,000, the plaintiff is claiming that it should have been allowed to deduct the entire amount of its loss from its otherwise taxable income. The position of the Government here is that taken by the Commissioner of Internal Revenue when he denied the plaintiff's claim for refund, that is, that the plaintiff's loss was a loss incurred in the sale of a capital asset, hence the loss was deductible from taxable income only to the amount of $2,000.

Section 23 (f), which we have quoted, is of course not very enlightening when taken by itself. Paragraph (j) of the same section shows that losses from sales of capital assets were not meant to be included in it. Article 23 (e)-3 of Treasury Regulations 94, promulgated under the Revenue

Act of 1936 is reproduced in the footnote.[1] It is the Government's interpretation of Section 23 (f). Regulations of similar content were promulgated as far back as the Revenue Act of 1918,[2] and have the force of law. *Helvering* v. *Winmill*, 305 U. S. 79. We shall therefore ascertain whether the transaction here in question is one of the kind described in the regulation, and therefore within Section 23 (f) of the statute.

The first sentence of the regulation seems to describe what plaintiff did with regard to its Northwood plant, reserving for the moment the adverb "suddenly". There was a change in business conditions, as they appeared to the plaintiff's managers in 1936, as compared with the time when they built or acquired the Northwood plant. If there had not been, they would not have been willing to abandon that plant, salvaging it for less than its depreciated value, and spend almost three times the expected salvage recovery in

[1] ART. 23 (e)-3. *Loss of useful value.*—When, through some change in business conditions, the usefulness in the business of some or all of the capital assets is suddenly terminated, so that the taxpayer discontinues the business or discards such assets permanently from use in such business, he may claim as a loss for the year in which he takes such action the difference between the basis (adjusted as provided in section 113 (b) and articles 113 (a) (14)-1, 113 (b)-1, and 113 (b)-2) and the salvage value of the property. This exception to the rule requiring a sale or other disposition of property in order to establish a loss requires proof of some unforeseen cause by reason of which the property has been prematurely discarded, as, for example, where an increase in the cost or change in the manufacture of any product makes it necessary to abandon such manufacture, to which special machinery is exclusively devoted, or where new legislation directly or indirectly makes the continued profitable use of the property impossible. This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized. It does not apply to inventories or to other than capital assets. The exception applies to buildings only when they are permanently abandoned or permanently devoted to a radically different use, and to machinery only when its use as such is permanently abandoned. Any loss to be deductible under this exception must be fully explained in the return of income. The limitations provided in section 117 with respect to the sale or exchange of capital assets have no application to losses due to the discarding of capital assets.

* * * * *

In cases in which depreciable property is disposed of due to causes other than exhaustion, wear and tear, and normal obsolescence, such as casualty, obsolescence other than normal, or sale, a deduction for the difference between the basis of the property (adjusted as provided in section 113 (b) and articles 113 (a) (14)-1, 113 (b)-1, and 113 (b)-2) and its salvage value and/or amount realized upon its disposition may be allowed subject to the limitations provided in the Act upon deductions for losses, but only if it is clearly evident that such disposition was not contemplated in the rate of depreciation.

[2] See Article 143 of Regulations 45.

building a new plant to house the Northwood operation. We think the words "change in business conditions" in the Regulations must mean, "in the opinion of the managers of the business." They cannot refer to anything more objective than that, since assets are discarded upon the basis of that opinion, and upon no other basis.

The words "the usefulness in the business of some or all of the capital assets is * * * terminated" must mean terminated in whole or in such part that, in the opinion of the managers of the business, good management calls for their being discarded. Practically never is a capital asset wholly useless when discarded. It is discarded when it becomes relatively uneconomical to continue to use it, when its use is considered in relation to one or more alternatives. This choice was here made by the plaintiff's managers, and their action comes within the quoted language of the regulation.

We now come to the word "suddenly" which precedes the word "terminated" in the language quoted in the preceding paragraph. We think that this word, also, is a relative word. We think it was written to contrast with the word "gradual" which appears in the following sentence in the same paragraph of the regulation:

> This exception does not extend to a case where the useful life of property terminates solely as a result of those gradual processes for which depreciation allowances are authorized.

If the word "suddenly" means anything more nearly instantaneous than we have suggested, the regulation would practically never be applicable. The language of the whole regulation indicates that it was not intended to be limited to infrequent situations where by legislation or by catastrophe the supply of raw materials, or the market, has been destroyed in a day. Here the relative usefulness of the Northwood plant terminated, not by physical decay, nor by obsolescence, *see S. S. White Dental Manufacturing Co.* v. *United States*, 93 C. Cls. 469, but by changes in conditions, affecting the plaintiff's business, sufficient to cause the managers to conclude that it would be economical to discard

the plant. We think that the word "suddenly" in the regulation is satisfied, though it seems to us to be a rather inept word to express the apparent meaning of the regulation.

The regulation, in its second sentence, speaks of a requirement of "proof of some unforeseen cause by reason of which the property has been prematurely discarded * * *." We think that this language, when read in connection with the next following sentence, means only that the cause of its being discarded must have been unforeseen when the asset was acquired so that depreciation of its cost, on the basis of a short prospective use, would not have been an allowable deduction from income.

In the instant case the Northwood plant was sold within the taxable year in which its use was abandoned, in fact within two months after it was abandoned. We think that is immaterial to our problem. Of course, it made the amount of the loss quite definite, and avoided the necessity of reliance upon estimates as to the salvage value of the abandoned plant. But the loss occurred before the sale. When the plaintiff's directors decided, in 1936, to abandon the Northwood plant, they did not have any contract to sell it. When they built the new Staten Island plant to replace it, they still had no contract to sell it. When they vacated the Northwood plant on May 1, 1937, and abandoned its use, they still had no such contract. They were, in arriving at their decision to abandon, not in the situation of making a choice between keeping and operating the Northwood plant, on the one hand, or accepting an offer which they had in hand to sell that plant and, with that money and more, and in view of other advantages, building a new plant at Staten Island. If that had been the case, we suppose their loss would have been a loss on a sale, which they chose to make because they preferred the price to the plant. But here they first abandoned the plant, taking their chances as to whether and for how much they could sell it. It was thus made useless to them before they sold it. When one discards capital assets, he hopes to sell the discard, and has an opinion or a hope as to how much he will get for it. When and if he sells, he is not selling a current capital asset, but is salvaging a discarded capital asset.

Plaintiff is entitled to recover. Entry of judgment will await the filing of a stipulation by the parties as to the amount of the judgment. It is so ordered.

Littleton, *Judge;* and Booth, *Chief Justice* (retired), recalled, concur.

In accordance with the above opinion, upon the filing of a stipulation by the parties showing the amount due thereunder to be $17,539.70 with interest as provided by law, and upon plaintiff's motion for judgment, it was ordered October 2, 1944, that judgment be entered for the plaintiff in the sum of $17,539.70, with interest as provided by law.

Whitaker, *Judge*, dissenting:

I am unable to agree with the opinion of the majority.

In *Real Estate-Land Title & Trust Co.* v. *United States*, 309 U. S. 13, 16, the plaintiff as a result of a consolidation acquired two title plants. Both of them were efficient plants, but in the hands of plaintiff one was a duplication of the other and so it decided to abandon one. It claimed the right to deduct the value of the one abandoned, less its salvage value, under the provision of the statute providing for a deduction for obsolescence. The Supreme Court denied its claim. It said:

> * * * obsolescence under the Act connotes functional depreciation, as it does in accounting and engineering terminology. More than nonuse or disuse is necessary to establish it. To be sure, reasons of economy may cause a management to discard a title plant either where it has become outmoded by improved devices or where it is acquired as a duplicate and therefore is useless. But not every decision of management to abandon facilities or to discontinue their use gives rise to a claim for obsolescence. For obsolescence under the Act requires that the operative cause of the present or growing uselessness arise from external forces which make it desirable or imperative that the property be replaced. * * * Suffice it here to say that no such external causes are present, for the record shows little more than the desire of a management to eliminate one plant which was a need-

> less duplication of another but which functionally was adequate. The fact that fewer employees were required to operate the one retained than the one discarded is inconclusive here. For this is not the case of acquisition of a new plant to take the place of one outmoded or less efficient. Rather the conclusion is irresistible that the plant was discarded only as a proximate result of petitioner's voluntary action in acquiring excess capacity.

Following that case we held in *The S. S. White Dental Mfg. Company* v. *United States*, 93 C. Cls. 469, that the plaintiff was not entitled to deduct in the year 1936 obsolescence of its Northwood plant, the identical plant here involved. In the former proceeding plaintiff sought to deduct in the year 1936, the year in which it had decided to abandon this plant as soon as additional buildings at its Staten Island plant could be erected, 75 percent of the value of the plant, less its salvage value, and 25 percent in the year 1937. If it was entitled to a deduction on account of obsolescence at all, it was entitled to deduct at least a part of it in the year in which it had decided to abandon its plant. We held it was not entitled to a deduction for obsolescence at all, and that decision, of course, is controlling here on its right to the deduction under the obsolescence section of the statute.

This leaves open only the question as to whether or not it is entitled to the deduction under section 23 (f) of the statute (49 Stat. 1648, 1659), which provides for a deduction of "losses sustained during the taxable year and not compensated for by insurance or otherwise."

In *Real Estate-Land Title & Trust Co.* v. *United States*, *supra*, the Supreme Court refused to decide this question because in that case plaintiff's claim for refund was not based upon that section, but upon the obsolescence section.

I am, however, of the opinion that the plaintiff is not entitled to the deduction under this section for the same reason it is not entitled to it under the obsolescence section.

Plaintiff claims the deduction under article 23 (e)–3 of Treasury Regulations 94, which was promulgated in explanation of section 23 (f) of the statute. This article allows a deduction of "abnormal obsolescence." It was promulgated because of the restricted interpretation put upon

section 23 (l) of the statute authorizing the deduction of "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, *including a reasonable allowance for obsolescence.*" (Italics ours.) The Commissioner held that this obsolescence deduction had to be taken annually over the life of the property in anticipation of the time the property would become obsolete. Regulations 94, art. 23 (l)–6. To take the deduction the taxpayer had to foresee that the property would become obsolete before its usefulness was exhausted by wear and tear. But, obviously, this did not take care of the case where the property became obsolete unexpectedly, as, for example, where some new and unexpected invention of a new machine outmoded the old, necessitating its abandonment. Not having expected the invention the taxpayer had not taken a deduction for obsolescence of his old machine during the years he had used it, and yet he had to discard it, not because it had worn out, but because it was no longer profitable to use it. To meet this situation article 23 (e)–3 was promulgated.

It was intended to take care of unforeseen obsolescence. This seems plain from a reading of it. It speaks of the "sudden" termination of the usefulness of the property due to an "unforeseen cause." It allows the deduction for "causes other than * * * *normal obsolescence*, such as casualty, *obsolescence other than normal*," etc. (Italics ours.)

The deduction claimed is for obsolescence. In this case it is claimed under article 23 (e)–3 as abnormal obsolescence; in the former case it was claimed under 23 (l) as obsolescence there allowed. Following the Supreme Court's decision in the *Real Estate-Land Title & Trust Co.* case, *supra*, we held in the former case (93 C. Cls. 469) that it was not entitled to the deduction because its abandonment was not the result of "external forces" but only on account of the voluntary act of the management done to effect economy in operation. The same is true in this case. If a deduction for gradual obsolescence can be taken only where the abandonment of the property is a result of external forces, it must follow that abnormal obsolescence can only be taken in the same circumstances.

Plaintiff falls far short of coming within the terms of the Regulation. The property was not abandoned as a result of "some change in business conditions." Its usefulness was not "suddenly terminated" due to some change in business conditions. No "unforeseen cause" brought about its abandonment. No change in business conditions is pointed out. Apparently business conditions had been the same for a number of years. No cause that had not existed for years brought about the sudden termination of the usefulness of the property. Plaintiff voluntarily abandoned the building because it decided to consolidate its operations. The building was still "functionally adequate." It lost its value to plaintiff only because plaintiff decided to transfer its operations elsewhere.

The transaction here was nothing more nor less, in my opinion, than the sale of a capital asset. Plaintiff had a building in Northwood which it did not want and it sold it, and it is entitled only to the deduction provided for on a sale. This is limited by section 117 (d) of the Revenue Act of 1936 (49 Stat. 1648, 1692) to $2,000.00. This has been allowed it.

I am of opinion that the plaintiff is not entitled to recover and that its petition should be dismissed.

WHALEY, *Chief Justice*, concurs in the foregoing opinion.

RONALD L. TREE AND NANCY PERKINS FIELD TREE, HIS WIFE, v. THE UNITED STATES

[No. 45025. Decided June 5, 1944*]

On the Proofs

Income tax; annual payments received as compromise of claim for dower taxable as income.—Where plaintiff, Nancy Perkins Field Tree, under a consent decree and agreement, settled her claim for dower in the estate of her deceased husband, Henry Field, receiving for the year 1920 one-third of the income for that year from the husband's share of the real estate and receiving thereafter a stated sum per year, which she agreed

*Plaintiff's petition for writ of certiorari denied March 5, 1945.

Syllabus

to accept in full satisfaction of her dower rights; and where for the years 1930 and 1931, the annual payments not having been included in the plaintiff's income tax return for those years, the Commissioner of Internal Revenue issued deficiency notices for those years and assessed and collected taxes, with interest, on the payments received in each of those years; it is *held* that the annual payments received from the estate were dower for tax purposes and as such were income taxable to plaintiff, and plaintiff is not entitled to recover.

Same.—Following the decision in *Lyeth* v. *Hoey*, 305 U. S. 188, where plaintiff, as Henry Field's widow, claimed dower in the real estate in which under his grandfather's will her deceased husband had an interest; and where, her claim being doubtful and contested, plaintiff compromised for less than she would probably have received if her claim had been clear and uncontested; it is *held* that the payments for which she compromised, to be paid to her as dower would have been paid, were dower for tax purposes.

Same; income taxable to beneficiary under section 162 (b) of Revenue Act of 1928.—The payments made annually to plaintiff from the estate of her deceased husband's grandfather, under the court decree and agreement, were of the character of "income which is to be distributed currently by the fiduciary to the beneficiaries" and hence not taxable to the fiduciary under section 162 (b) of the Revenue Act of 1928 (45 Stat. 791, 838), which further provides that if such deduction is allowed, "the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries."

Same; effect of guarantee of annual payments.—Where the agreed annual payments to plaintiff were guaranteed by her deceased husband's brother, who was co-devisee of his grandfather's estate; and where plaintiff contends that under section 162 (b) the brother and not the plaintiff was the beneficiary, and that the income of the deceased husband's share, as income, was not the husband's but the brother's, and that the trustees of the estate were merely the brother's agents in making the annual payments to plaintiff pursuant to his promise; it is *held* that on this theory the consent decree and agreement would amount to an assignment by the brother to the plaintiff of a portion of the income from real estate which plaintiff's husband had owned, and as such it would not be taxable to the assignor but to the assignee, who owned the interest for her life and received the income. *Blair* v. *Commissioner*, 300 U. S. 5; *Commissioner* v. *Field*, 42 Fed. (2d) 820.

Same.—The agreement by the brother of plaintiff's husband to make up any deficit if the estate income was not sufficient to make the agreed annual payments to plaintiff, did not change the

nature of plaintiff's interest from either that of dowress or assignee to some other kind of interest, the current receipts from which were not taxable income.

The Reporter's statement of the case:

Mr. Allen H. Gardner for the plaintiffs. *Messrs. Morris, Kix Miller & Baar* were on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Fred K. Dyar* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, Ronald L. Tree, is, and has been since sometime during the year 1933, a citizen of Great Britain and has resided in England since 1927. Great Britain accords to citizens of the United States the right to prosecute claims against it, the British Government, in its courts.

2. Plaintiff, Nancy Perkins Field Tree, is the wife of Ronald L. Tree. She has always been a citizen of the United States, but is a resident of England. She was born September 10, 1897, and her name from that time until February 7, 1917, was Nancy Perkins. On that day she married Henry Field, who died July 8, 1917, without issue. Plaintiff, then Nancy Perkins Field, married Ronald L. Tree May 4, 1920.

3. Henry Field and his brother, Marshall Field III, were two of the surviving grandsons of Marshall Field who died testate on January 16, 1906, a resident of Chicago, Illinois. Marshall Field III was born September 28, 1893, and Henry Field was born July 18, 1895. These two grandsons were the beneficiaries mentioned in the twentieth article of the will of Marshall Field.

4. By the twentieth article of his will, Marshall Field left the residue of his estate, real and personal, in trust for these two grandsons, Marshall Field III and Henry Field. Marshall was to receive three-fifths and Henry two-fifths. The will provided that the corpus of this residuary trust estate and one-half the net income therefrom should be held under certain trusts. This particular trust fund has been referred to as the "Principal Trust Fund." The will also provided that the other half of the net income from the trust

corpus should be held on certain other trusts. This second trust fund has been referred to as the "Accumulated Income Trust Fund."

5. The will provided as to the "Principal Trust Fund" that out of the trust corpus there should be paid specified amounts at specified ages to the grandsons, Marshall and Henry. The trustees were directed during the early years of the trust to hold and invest for accumulation one-half the net income of the trust corpus and to add such accumulations of income to the trust estate. In the later stages of the trust, however, the trustees were to pay out to the grandsons specified parts of this same one-half of the trust income as currently earned. These portions were to increase with the respective ages of the grandsons until they reached the age of forty-five, respectively, after which the entire net income of the trust corpus was to be paid to them until the trust estate was distributed. When Marshall reached the age of fifty, the trust estate was to be distributed to Marshall and Henry, three-fifths and two-fifths, respectively.

6. The testator directed as to the "Accumulated Income Trust Fund" that the other one-half of the net income of the residuary trust corpus should be separately held and invested for accumulation until the grandsons, respectively, reached age forty-five. The trustees were then to distribute to the grandsons the funds representing this one-half of the net income and the accumulations thereof.

7. The twentieth article of the will further provided:

> If either of my said grandsons shall die, either in my lifetime, or after my decease and before the distribution to him of his said share of the capital of said trust estate as herein directed, without leaving any issue him surviving, or shall die before such distribution leaving issue him surviving, and all such issue shall die before the youngest surviving child of such deceased grandson shall attain the age of twenty-one (21) years, in either such event I give, devise and bequeath the entire trust estate to the other of my said grandsons and to his issue, said issue to take per stirpes and not per capita. I direct that said Trustees in either such event shall hold the entire trust estate in trust for my said surviving grandson and for his issue upon the same trusts and subject to the same directions as to retaining,

> administering, applying, distributing, conveying, transferring, and delivering over the same as are hereinbefore contained in respect to each of said grandsons and to his issue concerning his respective share of said trust estate and the income and capital thereof.

As shown in finding 2 Henry Field died July 8, 1917, without issue, leaving him surviving his widow, Nancy Perkins Field. At that time Henry Field's share of Marshall Fields estate had not been distributed to him.

8. February 13, 1918, the trustees under the twentieth article of the will of Marshall Field filed in the Superior Court of Cook County, Illinois, a court of competent jurisdiction, a bill in equity praying that the court approve their acts as trustees and enter a decree as to the correct method of computing the net income derived in each year from the trust estate. Marshall Field III, as one of the trustees and also in his individual capacity, on July 21, 1919, filed a cross-bill in the action praying that the court construe the will of Marshall Field and direct the trustees to turn over to him free, by reason of the death of Henry Field, of any trust, all or part of the trust estate held by them under the twentieth article of the will.

On or about March 29, 1920, plaintiff, then Nancy Perkins Field, who had been made one of the parties defendant by the cross-bill of Marshall Field III, filed an answer to the cross-bill. In that answer she, as the widow of Henry Field, claimed a dower interest in two-fifths of the realty held by the trustees during the period of her marriage to Henry Field and in the proceeds of any such realty as might have been sold, her claim being set out as follows:

> This cross-defendant states that she is informed and believes that by the terms of said Twentieth Article of the will of said Marshall Field, decreased, and the codicils thereto, a copy of which said will and codicils is annexed to said cross-bill as aforesaid, the said Trustees received by devise certain pieces and parcels of real estate, of the nature and description of which she is ignorant, upon such trusts that said Henry Field, her deceased husband, became entitled to and was seized of, and during the period of his said marriage to this cross-defendant continued to be seized of, a vested estate of

inheritance of his own right, namely, an equitable fee simple determinable in an undivided two-fifths part of said real estate. This cross-defendant claims dower in said two-fifths part of all of the said pieces and parcels held by the said Trustees at any time during the period of this cross-defendant's marriage to the said Henry Field, and in the proceeds, real or personal, direct or indirect, of any of said pieces or parcels which during said period or thereafter may have been sold or in anywise transferred by said Trustees, or any of them. And this cross-defendant states that she has made due demand in writing for the assignment of dower in a two-fifths part of these pieces, parcels and proceeds upon the said residuary trustees and upon said Marshall Field III, personally and individually; but that neither the said residuary trustees, nor the said Marshall Field III, nor any other person, has assigned dower in said pieces, parcels, or proceeds, or any of them, to this cross-defendant.

9. July 13, 1920, the Superior Court of Cook County, Illinois, entered a final decree in the equity suit referred to in finding 8 which read in part as follows:

> *Twenty-second.* For convenience and brevity, all the share of the capital or principal of the trust estate mentioned in Article Twentieth of said will of Marshall Field, deceased, that the testator's grandson, Henry Field, deceased, would have received pursuant to said Article Twentieth of said will, if he had survived to attain the age of fifty (50) years, is sometimes herein called "Henry Field's share of the trust estate", and the remainder of the capital or principal of the said trust estate is sometimes herein called "Marshall's share of the trust estate" or "Marshall's original share of the residuary estate", but with no implication by this court of any vesting in any case.
>
> That the true and proper construction, interpretation, intent, meaning and effect of said will of Marshall Field, deceased, is—
>
> (1) That the death of Henry Field without issue in nowise affected the trusts upon which Marshall Field III's original share (or three-fifths) of the residuary estate is held under the will of Marshall Field, deceased, and in nowise affected the powers or duties of the Trustees over or in relation to said Marshall's original share of the residuary estate;

(2) That upon the death of Henry Field without issue, the entire accumulated income from his share (or two-fifths) of the residuary estate became an addition to the capital or principal of his share of the trust estate, and that said last mentioned share, with the accumulated income so added thereto, became a trust estate to be held upon the same trusts as said Marshall Field III's original share of the residuary estate is held under the said will, except that the net income therefrom as received by the Trustees under said will shall be paid to Marshall Field III, and that the amount to be paid to Marshall Field III, out of the capital or principal of Henry Field's share of said trust estate when Marshall Field III attains the ages of thirty, thirty-five and forty years, respectively, is Three Hundred Thousand Dollars ($300,000) instead of Four Hundred and Fifty Thousand Dollars ($450,000) which said Four Hundred and Fifty Thousand Dollars ($450,-000) is to be paid out of the capital or principal of Marshall's original share (or three-fifths) of said trust estate at the same times; and said Trustees are by said will given all the powers, rights, discretion and authority with respect to the capital or principal of Henry Field's share (or two-fifths) of the residuary estate that said Trustees are given by the said will with respect to said Marshall's original share of the residuary estate, unaffected by the death of Henry Field without issue.

(3) That said Henry Field having died without issue, said Trustees were by said will directed to pay to Marshall Field III out of the capital or principal of Henry Field's share of the trust estate, the sum of Three Hundred Thousand Dollars ($300,000) when Marshall Field III attained the age of twenty-five years, to wit: on September 28th, 1918; and also the like sum of Three Hundred Thousand Dollars ($300,000) when said Marshall Field III shall attain respectively the ages of thirty years, thirty-five years and forty years;

(4) That the trusts for accumulation of income from Henry Field's share (or two-fifths) of the said trust estate ceased upon the death of said Henry Field, and that thereupon Marshall Field III became entitled (absolutely with all the incidents of absolute ownership, including the right of testamentary disposition and transmission by him to his heirs and next of kin by inheritance from him) to all of the net income thenceforth accruing and to accrue from Henry Field's share (or two-fifths) of said residuary estate during the whole of the period during which said Trustees may hold the

principal or corpus of said trust estate upon the provisions of said will.

Twenty-third. That as to the claim of Nancy Perkins Field for dower in Henry Field's share (or two-fifths) of the real estate at any time during her coverture with Henry Field held by the Trustees under Article Twentieth of the will of Marshall Field, deceased, the only beneficiary who will be affected by the allowance of such claim for dower, so long as the income from said two-fifths share is payable to or subject to the disposition of Marshall Field III under the provisions of said will and of this decree, is Marshall Field III; that said Marshall Field III, through his counsel stated in open court on the trial of this cause that he did not oppose the said claim for dower. The court finds in favor of the allowance of said claim of Nancy Perkins Field for dower, subject to the rights of all parties in interest (including Nancy Perkins Field) other than said Marshall Field III, and those claiming an interest in the residuary estate through or under him to litigate the said claim for dower after the termination of the period during which the income of said two-fifths share is payable to or subject to the disposition of Marshall Field III under the provisions of said will and of this decree, without prejudice in any way from the entry of the decree in this cause.

10. As a result of the findings set out above, the court entered the following order:

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT:

*   *   *   *   *

(n) That as against Marshall Field III and all parties claiming an interest in the residuary estate through or under him Nancy Perkins Field, the widow of Henry Field, is entitled to dower in an undivided two-fifths (2/5ths) part of any and all real estate now held in fee by the Trustee under Article Twentieth of the will of Marshall Field, deceased, which was acquired by them before Henry Field's death, and also in two-fifths (2/5ths) of the proceeds of any such real estate so held by the said Trustees in fee at any time during the continuance of said marriage which has been sold or transferred by the said Trustees either before or after the death of said Henry Field. But the court further adjudges and decrees that the Trustees under said Article Twentieth of said will have full power and authority to sell and convey any and all of the real estate held by them in trust

free and clear from any dower right therein of the said Nancy Perkins Field, and that her said dower right in any real estate so sold shall, upon the sale thereof, attach to the proceeds of any such sale; and the court further adjudges and decrees that after the division of the residuary estate as in this decree provided, the amount payable to the said Nancy Perkins Field for her said dower shall be paid by the said Trustees wholly out of the income of Henry Field's share (or two-fifths) of the said residuary estate, and that Marshall Field III's share (or three-fifths) share of the residuary estate shall be held by the Trustees, free from any dower rights of the said Nancy Perkins Field.

The foregoing adjudication as to the dower rights of said Nancy Perkins Field shall not so long as the income of said two-fifths share is payable to, or subject to the disposition of Marshall Field III under the provisions of said will and of this decree, bind any party to this cause other than said Trustees, Marshall Field III, and those claiming an interest in the residuary estate through or under said Marshall Field III, and after the termination of the period during which the income of said two-fifths share is payable to, or subject to the disposition of Marshall Field III under the provisions of said will and of this decree, any party then or thereafter interested in the said residuary estate other than said Marshall Field III and those claiming an interest in the residuary estate through or under him, shall have full right to contest and litigate said claim, for dower, without prejudice by reason of the entry of the decree in this cause.

The decree further provided:

And all the remainder of the two-fifths of said Accumulated Income Trust Fund shall be added to the remainder of the two-fifths of said Principal Trust Fund as shown by such Master's report and the whole Trust Fund so formed shall be held by said Trustees upon the same trusts as Marshall's original share in said will mentioned is directed to be held except that the net income therefrom as received shall be paid to Marshall Field III, or his legal representatives during the continuance of the trust and that out of the capital or principal thereof shall be made the said payments of Three Hundred Thousand Dollars ($300,000) each herein mentioned, as distinguished from the Four Hundred and Fifty Thousand Dollars ($450,000) payments which are to be made to him out of Marshall's original share of the trust estate.

The trust fund described in the above paragraph later became known as the "Two-Fifths Non-Cumulative Trust Fund".

11. Some time prior to July 13, 1920, the date of the decree and order referred to in findings 9, and 10, Nancy Perkins Field Tree, she having married Ronald L. Tree on May 4, 1920, and Marshall Field III entered into a written agreement which was subsequently dated July 14, 1920, and delivered to the trustees under the twentieth article of the will of Marshall Field. That agreement, after referring to the suit pending in the Superior Court of Cook County and to the fact that Nancy Perkins Field Tree was claiming a dower interest in the residuary estate held by the trustees under the twentieth article of Marshall Field's will, stated that, since a serious question existed as to whether the claim for dower could be maintained and since the parties were desirous of settling the claim, it was agreed between them as follows:

> *First.* That a decree may be entered in the said cause by the said Superior Court construing the said will of Marshall Field, deceased, so as to sustain the said second party's said claim for dower as against the said party of the first part, and as against all parties claiming any interest in the said residuary estate by, through, or under the said party of the first part.
>
> *Second.* That the amount payable to said party of the second part in satisfaction of her said right of dower is hereby fixed and established at Seventy-five Thousand Dollars ($75,000.00) per year for and during her life, payable in equal quarterly amounts of Eighteen thousand seven hundred & fifty Dollars ($18,750.00) each on the first day of the months of January, April, July, and October.
>
> *Third.* This agreement shall continue in full force and effect, and the amount of the payments to be made for dower to the said party of the second part under said decree shall be controlled thereby, so long as said party of the first part, or any person or persons claiming by, through, or under him, shall receive the net income (less the amounts payable to said second party for her dower therein) from Henry Field's two-fifths (2/5ths) of said residuary estate.
>
> *Fourth.* This agreement shall in nowise affect or limit the dower rights of the said party of the second part, or

> the amount payable to her in satisfaction thereof, so far as the same shall accrue or arise after the date when the said party of the first part, or his representatives, and persons claiming by, through, or under him, shall cease to be entitled to receive the net income of Henry Field's two fifths (2/5ths) of said residuary estate (subject, however, to said dower rights), under the decree entered as aforesaid.

12. The trustees made a division of the properties pursuant to the decree of July 13, 1920, and on February 26, 1921, filed a report of such division with the Superior Court of Cook County. This property division was approved by the court in a decree entered February 26, 1921.

13. On or about May 24, 1921, Nancy Perkins Field Tree and Marshall Field III executed and delivered to the trustees under the twentieth article of the will of Marshall Field a written contract and notice providing for payment to Nancy Perkins Field Tree of $85,000 a year. That notice and agreement read as follows:

> You are hereby notified that the undersigned, MARSHALL FIELD and NANCY PERKINS FIELD TREE, have agreed that there shall be paid to the said Nancy Perkins Field Tree the sum of Eighty-five thousand dollars ($85,000.00) per year, payable in equal quarterly amounts of Twenty-one thousand two-hundred & fifty dollars each, on the first day of the months of January, April, July and October in each year, beginning with the year 1921, in full satisfaction of all her claims and right of dower accruing after January first, 1921, in and to any and all of the real estate, and the proceeds thereof, now or hereafter held by the said Trustees; the said Trustees to make payment to the said Nancy Perkins Field Tree for her dower rights for the year 1920 without regard to the said agreement, and in pursuance of her rights as established by the decree of the Superior Court of Cook County heretofore entered; and the said Nancy Perkins Field Tree hereby agrees to receive and accept said payments above specified in full satisfaction of all her dower rights in the property now or hereafter held by the said Trustees, as aforesaid.

14. On or about May 24, 1921, the trustees paid to Nancy Perkins Field Tree the sum of $226,776.78 in consideration of her dower claim from March 29, 1920, to December 31,

1920, less the sum of $106,936.22 for federal income taxes for the year 1920 reserved and paid by the trustees on account of the dower payment. The amount of $226,776.78 represented one-third of the net income of the properties described in paragraph (n) of the decree of July 13, 1920, as "an undivided two-fifths (2/5ths) part of any and all real estate now held in fee by the Trustees under Article Twentieth of the will of Marshall Field, deceased, which was acquired by them before Henry Field's death, and also in two-fifths (2/5ths) of the proceeds of any such real estate so held by the said Trustees in fee at any time during the continuance of said marriage which has been sold or transferred by the said Trustees either before or after the death of said Henry Field."

15. During each of the years from 1921 to and including the year 1931, the trustees paid to Nancy Perkins Field Tree the amount of $85,000 specified in the agreement of May 24, 1921, between Nancy Perkins Field Tree and Marshall Field III.

16. One-third of two-fifths of the annual net income from the realty held by the trustees under the twentieth article of Marshall Field's will during the period of Nancy Perkins Field Tree's marriage to Henry Field and which was still held during the years 1930 and 1931, not including income from the proceeds of such realty as may have been sold, amounted to $269,635.18 and $219,864.43 for the years 1930 and 1931, respectively.

17. The value in 1921 of the agreement to pay Nancy Perkins Field Tree the annuity of $85,000 was in excess of $1,581,654.41, if that annuity was payable for her life. If, however, that annuity was to end, even though she was still living, on September 28, 1943, the date when Marshall Field III would become fifty and the trust would terminate, the 1921 value of the $85,000 annuity was less than $1,581,654.41, but was more than $1,173,450.75.

18. For the calendar years 1927 and 1928, Nancy Perkins Field Tree filed federal income tax returns separately from those of her husband, Ronald L. Tree, reporting therein the $85,000 annuity received in each year. January 8, 1931, the Commissioner of Internal Revenue sent Nancy Perkins

Field Tree a letter advising her that the inclusion by her of the annuity in her income tax returns for 1927 and 1928 was tentatively held to be in error and that she should protect her right to refunds by filing refund claims. Subsequently by a letter dated March 10, 1931, the Commissioner advised Mrs. Tree that it was held that no part of that annuity was taxable for the years 1927 and 1928 and suggested that she file appropriate claims for refund.

19. February 18, 1931, Mrs. Tree filed claims for refund for the years 1927 and 1928 in the respective amounts of $7,937.88 and $9,389.53 stating that these claims were filed in accordance with the Treasury Department's letter dated January 8, 1931. No action having been taken by the Commissioner in respect to these claims, Mrs. Tree filed a petition in the Court of Claims on September 12, 1933, Docket No. 42510, for refund of income taxes for the years 1927 and 1928 upon the ground that no part of the $85,000 paid to her in each of these years by the trustees under the agreement mentioned in finding 13 constituted taxable income. March 4, 1936, the Court of Claims dismissed the petition in the above-mentioned case on plaintiff's motion, the case having been settled administratively by the refund of seventy-five percent of the amount claimed for the years 1927 and 1928.

20. Mrs. Tree also filed a separate federal income tax return for 1929 and reported therein the annuity of $85,000. The Treasury Department held that this amount was not taxable and under date of September 19, 1932, the resultant overpayment for 1929 was refunded.

21. After receipt of the Commissioner's letter of March 10, 1931, referred to in finding 18, and before the plaintiff's federal income tax return was filed for 1930, a certified public accountant who had prepared and filed Nancy Perkins Field Tree's returns for a number of years discussed with Ronald L. Tree the question whether he and Mrs. Tree should file separate returns or a joint return for 1930. The problem was considered carefully with particular reference to the question of whether Mrs. Tree's annuity of $85,000 was taxable. The accountant, relying on the Treasury Department's ruling, concluded that the annuity was not taxable and decided that

a joint rather than a separate return should be filed. This was done. Prior to filing the income tax return for 1931, the same consideration as had been given the 1930 return was given to the question of whether the 1931 return should be joint. The same conditions existed; the same decision was reached, and a joint return was filed.

22. The joint return for 1930 referred to in finding 21 was filed by Ronald L. Tree May 29, 1931, and included the income of himself and his wife. The return was signed by Mr. Tree. It showed a gross income of $232,412.51, deductions of $168,757.22, net income of $63,655.29, and a tax liability of $4,984.85 which with interest of $15.33 was paid May 29, 1931. Among the deductions claimed in arriving at the net income were net losses incurred by Mrs. Tree from the operation of a farm in the amount of $12,622.99. Most of the other items of income and deductions were attributable to Mr. Tree. As said above, the return did not include any part of the annuity of $85,000 received by Mrs. Tree from the trustees under the will of Marshall Field.

23. May 20, 1932, Mr. Tree filed the joint federal income tax return, referred to in finding 21, for the calendar year 1931 reporting therein the income of himself and his wife. The return was signed by Mr. Tree. It showed a gross income of $184,563.77, deductions of $113,642.75, net income of $70,921.02, and a tax liability of $5,997.31 which with interest thereon of $16.25 was paid in full May 20, 1932. This return showed a net loss, from the operation of a farm, sustained by Mrs. Tree, which loss was taken into consideration in arriving at the joint net income. Most of the other items of income and deductions were attributable to Mr. Tree. The return included only $9,797.91 of the annuity of $85,000 received by Mrs. Tree from the trustees under the will of Marshall Field, that amount being determined as follows:

Value of Statutory Interest in 1920 of agreement with Mr. Field—as given in letter from Treasury Department March 10th, 1931. It: C: cc: 3–EB	$967, 702. 09
LESS: Amounts stated to have been [received] to the close of the year 1928	722, 500. 00
	$245, 202. 09

LESS: Amounts received in 1929 and 1930 at $85,000 per annum	$170,000.00
Balance of purchase of Dower interest Dec. 31, 1930	$75,202.09
Mrs. Tree's Dower payment to Dec. 31, 1931	$85,000.00
LESS: Above balance of purchase price	75,202.09
TAXABLE BALANCE AS TREASURY BASIS FOR CALENDAR YEAR 1932	$9,797.91

24. In 1932 the Commissioner assessed an additional income tax against plaintiffs for 1930 in the amount of $336.75 which amount with interest of $30.06 was paid September 15, 1932. Thereafter on May 27, 1933, the Commissioner issued a deficiency notice in which he advised plaintiffs of his determination of a further deficiency against them for 1930 in the amount of $20,172.80. In that determnation the Commissioner included in gross income the annuity payment of $85,000 to Mrs. Tree and gave the following explanation of his action:

> A letter was received in this office on May 8, 1933, from the trustees of the Estate of Marshall Field, 2/5's noncumulative trust fund, Chicago, Illinois. The trustees are protesting the holding of the Bureau for the year 1931, that the payment of $85,000.00 to Mrs. Tree was not income to her but was a payment in lieu of dower and not taxable to her until such payments equalled the value of her dower. The trustees contend that the payment to Mrs. Tree was income to her and as such was properly shown as her distributive share of income on the fiduciary return of income filed for the Estate of Marshall Field, 2/5's noncumulative trust fund.
>
> Since the trustees of the above-named estate have raised the question, that the said income of $85,000.00 received by Mrs. Tree should be taxed to her, the total amount has been added to the net income of $65,656.47 as shown by the examining officer's report dated July 20, 1932, in order to protect the interest of the Government.

The asserted deficiency of $20,172.80 with interest thereon of $2,776.38 was paid July 17, 1933.

25. Prior to the payment of the further deficiency for 1930 on July 17, 1933, referred to in the preceding finding, there was forwarded to the Commissioner under date of June 12, 1933, on behalf of plaintiffs by their duly authorized attorney-in-fact, a waiver, Form 870, in which they waived the prohibition on assessment and collection within the sixty-day period following the mailing of the deficiency notice on May 27, 1933. This waiver form was enclosed with a letter dated June 12, 1933, signed for the plaintiffs by their attorney-in-fact and setting out the conditions under which the waiver was filed which included the following:

> In filing this waiver, however, we wish to make our position clear that we do not acquiesce in its correctness, and in due course, expect to file claim for its refund.
>
> The correctness of this additional tax depends upon whether or not Mrs. Tree is taxable on a certain annuity received by her in lieu of dower, before she had recovered the cost basis of her dower interest.
>
> Depending upon the Department's prior advice that the same was not taxable income to Mrs. Tree, until the cost basis of her dower interest had been recovered, (Department letter of March 10, 1931, addressed to Mrs. Nancy Perkins Field Tree, Ref.: IT: C: CC: EB), we filed a joint return for 1930. If this annuity is taxable income to Mrs. Tree, the resultant tax on a joint return is over twice as much as it would have been on separate returns that we would have filed for 1930, except for the Treasury Department's advice that said annuity was not taxable to Mrs. Tree. Therefore, if taxable, we submit the tax should be computed on the basis of separate returns.
>
> We understand from the Department that the occasion for this additional tax is that Marshall Field is contesting the Department's position that the same is not a deduction to him or to the estate of Marshall Field. The present weight of opinion of the Board and Courts decision appears to be that under the circumstances cited the amounts are not taxable to the widow regardless of whether or not deductible by the estate. However, as we already have two claims for refund pending for 1927 and 1928, involving this issue, we prefer to take the matter up on a claim for refund for 1930 also, rather than file a petition to the Board.

The Commissioner made his assessment subsequent to the filing of the waiver form.

26. In or about 1934, plaintiffs' accountant prepared a claim for refund for 1930 of $22,949.18 but there is no record in the collector's office of the filing of such claim and the record does not satisfactorily establish that such claim was filed.

December 20, 1938, plaintiffs filed a claim for refund for 1930 which was described as "Duplicate and/or Perfected Claim" and in which refund was sought of $22,949.18, the deficiency and interest for that year paid on July 17, 1933. The grounds of that claim are in general the same as now advanced in this suit as it relates to the year 1930. The Commissioner has not allowed this claim or any other claim for the year 1930.

27. May 18, 1934, the Commissioner issued a deficiency notice showing a deficiency in plaintiffs' income tax for 1931 of $18,716.35, which amount with interest thereon of $2,528.55 was paid in the amounts and on the dates shown below:

Tax	Interest	Date of payment
$14, 994. 20	$1, 786. 81	June 11, 1934
2, 722. 15	741. 74	August 3, 1934
1, 000. 00	------------	August 22, 1934

In arriving at that deficiency, the Commissioner included in gross income the annuity payment of $85,000 received by Mrs. Tree from the trustees under the will of Marshall Field.

28. June 7, 1934, Mr. Tree filed a claim for refund for 1931 in the amount of $3,722.15 on the ground that a capital net loss had been sustained on the sale of certain shares of corporate stock and that the loss had not been claimed in the original return for that year. Prior to that time, namely on May 19, 1934, Mr. Tree's attorney-in-fact had filed a claim in the same amount and on the same ground for that year on behalf of Mr. Tree.

29. October 29, 1934, plaintiffs filed a claim for refund for 1931 in the amount of $24,967.05. One ground of that claim was that no part of the annuity payment of $85,000 received by Mrs. Tree from the estate of Marshall Field constituted taxable income to her. It was further contended that if this amount did constitute taxable income to her, the tax liability of plaintiffs should be computed upon the basis of separate rather than joint returns. Deductions were also claimed for the capital net losses referred to in the claims previously filed and for an additional similar net loss on the sale of other stock, such amounts being the losses on account of which recovery is sought in this suit.

30. June 10, 1935, the Commissioner rejected the three refund claims for 1931 referred to in the two preceding findings and mailed to plaintiffs by registered mail a notice of the disallowance.

31. The trustees under the "Two-Fifths Non-Cumulative Trust Fund" which was set up under the will of Marshall Field, as heretofore shown, in their federal income tax returns for the calendar years 1930, 1931, and 1932, deducted for each year the annuity payment of $85,000 to Nancy Perkins Field Tree. That amount was disallowed by the Commissioner and resulted in the determination of a deficiency for each of those years. March 20, 1936, the trustees filed a petition with the United States Board of Tax Appeals seeking a redetermination of the asserted deficiencies. June 6, 1939, the Board of Tax Appeals rendered its opinion in that case holding that the amount of $85,000 was deductible by the trustees in each of the years in question.

32. Ronald L. Tree sustained a capital net loss of $63,-096.46 upon the sales in 1931 of shares of stock in certain corporations, the loss being on the sales and in the amounts claimed in the claim for refund filed October 29, 1934. The Commissioner did not allow any part of that net loss in his deficiency notice of May 18, 1934, referred to in finding 27.

33. The parties have stipulated that the present suit is timely so far as the calendar year 1931 is concerned by virtue of an agreement entered into between the Commissioner and the plaintiffs pursuant to the provisions of Section 608 (b) (2)

of the Revenue Act of 1928, as amended by Section 503 of the Revenue Act of 1934.

The court decided that the plaintiffs were not entitled to recover for the years 1930 and 1931 as to payments made to Nancy Perkins Field Tree and that the plaintiffs were entitled to recover for the year 1931 as to capital net loss.

MADDEN, *Judge*, delivered the opinion of the court:

Mrs. Tree, then Nancy Perkins, married Henry Field, February 7, 1917. He died on July 8 of that year. He and his elder brother, Marshall Field III, were grandsons of Marshall Field who had died on January 16, 1906, leaving a will which, in its twentieth article, gave the residue of his estate to trustees for the benefit of the two grandsons. The details of the trust disposition are shown in findings 4, 5, 6, and 7.

The corpus of Henry Field's share under the will of his grandfather, as well as a considerable part of the income from it, was to be turned over to him in stated amounts as he reached specified ages. If he died without issue, as he did, the share with its accumulations was to go to his brother Marshall. In litigation in the Superior Court of Cook County, Illinois, as to the duties of the trustees and the rights of Marshall Field III, after the death of Henry, Henry's widow, then Nancy Perkins Field, filed a pleading claiming dower in Henry's share of the real property which had been held by the trustees during the time that she was Henry's wife.

Since Henry's equitable ownership was defeasible upon his death without issue before the property was distributed to him, the question whether his widow was entitled to dower against Marshall, to whom the property was given over by the will, was a controversial one. See Restatement, Property, Section 54 and appendix to volume 1. The question was compromised by an agreement between Marshall and Henry's widow who had, on May 4, 1920, married Ronald L. Tree. As a result of this compromise, the court, with the consent of Marshall and Mrs. Tree, decreed that, as against Marshall and those claiming through or under him, Mrs. Tree should have dower in Henry Field's share of the residuary estate, payable out of the income of the estate, but that any other

person interested or who might become interested in the estate, would be free to contest Mrs. Tree's claim of dower.

As shown in findings 11 and 13, a written agreement made by Marshall and Mrs. Tree before the entry of the decree, but dated the day after, directed the trustees that the amount payable to Mrs. Tree for her dower should be $75,000 per year for her life. Another agreement was made on May 24, 1921, which directed the trustees to pay Mrs. Tree the full amount of her dower for the year 1920, that is, one-third of the income from Henry's share of the real estate, and for 1921 and thereafter $85,000 per year, which she agreed to accept in full satisfaction of her dower rights. The amount of her dower for the period March 29 to December 31, 1920, before deduction of federal income tax paid by the trustees was $226,776.78.

We construe the agreement between Marshall Field and Mrs. Tree as a surrender by Mrs. Tree, for the years after 1920, of any claim to more than $85,000 per year out of the income of Henry's share of the real estate, no matter how large that income might be; and as a personal guaranty on the part of Marshall that Mrs. Tree would be paid the $85,000 per year even if the income received by the trustees from Henry's share was not sufficient to enable them to pay that much.

For the years 1921 through 1931, the $85,000 per year was paid to Mrs. Tree. For the years 1927 and 1928 Mrs. Tree included the payments made in those years in her income tax returns and paid taxes accordingly. The Commissioner of Internal Revenue advised her that the payments were not taxable to her and suggested that she file claims for refund. She did so in 1931 and, the refund not having been made, she sued in this court and obtained a compromise administrative settlement for seventy-five percent of the claims. Upon a similar claim for refund of the 1929 tax, a full refund was made. However, for the years 1930 and 1931, the $85,000 not having been included in the plaintiffs' returns for those years, the Commissioner issued deficiency notices for those years and assessed and collected taxes, with interest, on the $85,000 received in each of those years.

Assuming that proper claims for refund were made, and that the present suit is timely brought, we reach the substantial question in the case, whether these annual payments by the trustees to Mrs. Tree were, in the circumstances, income taxable to her.

The plaintiffs concede that dower, that is, one-third of the income of the deceased husband's real estate, is income taxable to the widow. But they contend that what Mrs. Tree received was not dower, but an amount much less than dower would have been, which was the price at which she sold her dower to Marshall Field III who owned the property subject to her dower. They urge that she thereby, by the compromise, took the status of one who received an inheritance, payable in installments, rather than a portion of the income of the trust. They point to the fact, which we have found to be a fact, that Marshall Field III agreed to make up any deficit if the income in the hands of the trustees was not sufficient to pay the $85,000, as proof that the amount received was not dependent upon income, and therefore was not income.

In *Lyeth* v. *Hoey*, 305 U. S. 188, an heir, left out of a will, contested the will on the ground that the testator was incompetent and was unduly influenced. The contest was compromised, and the contestant received a share, apparently considerably less than he would have received if the will had been overthrown. It was held that what he received was an inheritance, and was not taxable as income; that the contestant was in fact an heir and that the theory of his contest was his right to inherit. The reasoning of that decision seems to us to characterize the payments to Mrs. Tree as dower. She was Henry Field's widow, she claimed dower in the real estate in which he had had an interest, and, her claim being doubtful and contested, she compromised for less than she would probably have received if her claim had been clear and uncontested. We do not see why the part which she compromised for, to be paid to her as dower would have been paid, is not dower for tax purposes.

So far as the trustees were concerned, the directions to them given by the court's decree and the agreement between

Mrs. Tree and Marshall Field III, gave their payments the character of "income which is to be distributed currently by the fiduciary to the beneficiaries," and hence not taxable to the trustees under section 162 (b) of the Revenue Act of 1928 (45 Stat. 791, 838.) The Board of Tax Appeals so held in *Continental Illinois National Bank and Trust Company et al* v. *Commissioner*, 40 B. T. A. 25. But section 162 (b) says that if the trustees may deduct the payment from the trust income, "the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries." We understand the plaintiffs' contention to be that, for this purpose, Marshall Field III, and not Mrs. Tree, was the beneficiary; that the income of Henry's share, as income, was Marshall's, and that the trustees were merely his agents in paying it to Mrs. Tree pursuant to his promise.

Analyzed in this way, we should think that the consent decree and the agreement would amount to an assignment by Marshall Field to Mrs. Tree of a portion of the income of the real estate which Henry had owned. As such, it would not be taxable to Marshall, the assignor, but to Mrs. Tree, the assignee, who owned the interest for her life and received the income. *Blair* v. *Commissioner*, 300 U. S. 5; *Commissioner* v. *Field*, 42 F. (2d) 820 (C. C. A. 2d).

We now consider the effect of Marshall Field's agreement to make up any deficit if the income in the hands of the trustees was not sufficient to pay the $85,000. We see no reason why this additional promise, made as a term of the compromise, should have changed the nature of Mrs. Tree's interest from that of either dowress or assignee to some other kind of interest, the current receipts from which were not taxable income. If one should sell a piece of income-producing property to another, and, as an inducement to the purchase, should guarantee that the purchaser would receive at least a specified income from it, we suppose that such income as the purchaser did receive would be taxable as income, whether payments made by the seller on the guaranty were or not. The fact of Marshall Field's additional promise did not convert Mrs. Tree's whole interest into a mere promis-

sory one. She was, under the court's decree, the owner of an interest in income-producing property, and of a right to receive that income up to the agreed amount. If Marshall Field III had lost his property and become unable to pay his guaranty, if necessary, she would still have received her income, just as she did receive it, so long as the property in the hands of the trustees produced it.

We conclude therefore, that the payments to Mrs. Tree were taxable, and that her payments are not refundable. It is, therefore, not necessary to consider the question of the adequacy of the claim for refund for the year 1930.

According to the stipulation of the parties, Ronald L. Tree was entitled to, and was denied, a deduction for a capital net loss of $63,096.46 sustained during the year 1931. His claim for refund was adequate and this suit is timely to recover that overpayment. The plaintiffs are entitled to recover. Entry of judgment may await the stipulation of the parties as to the amount of the judgment.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the above opinion, upon the filing of a stipulation by the parties showing the amount due thereunder to be $8,983.43, with interest on the amount of $1,000 from August 22, 1934, on the amount of $3,463.89 from August 3, 1934, and on the balance of $4,519.54 from June 11, 1934, and on plaintiffs' motion for judgment, it was ordered October 2, 1944, that judgment for the plaintiffs be entered in the amounts named above.

FRANK PAUL ROSS v. THE UNITED STATES

No. 43476

EARL ALEXANDER ROSS v. THE UNITED STATES

No. 43507

[Decided October 2, 1944]*

On the Proofs

Title to Public Lands; Taking.—Where the plaintiffs have received no muniments of title to the lands claimed by them, never having gotten beyond the stage of settlement upon the lands, securing relinquishments from preceding settlers, tendering applications for entry under the homestead laws, protesting against adverse claimants, and actively making known to the defendant their claims to the lands in question; and where plaintiffs were not allowed to make entry under the homestead laws by defendant's officers, acting in the presumed performance of their duty; it is *held* that the defendant has not deprived the plaintiffs of any lands to which the plaintiffs had any claim which could be enforced before any tribunal or quasi-tribunal, and plaintiffs are not entitled to recover.

Same.—Following the decision in *Putnam* v. *Ickes*, 78 Fed. (2d), 223, 226, certiorari denied, 296 U. S. 612, it is *held* that a private citizen cannot initiate or acquire under the public land laws of the United States rights in land occupied by others who claim under the United States, even if the prior claim and occupation be fraudulent and wrongful as against the United States.

Same; no equitable claim.—In the instant case the court cannot find such a claim as would justify recommending it to the conscience of Congress.

The Reporter's statement of the case:

Mr. Warren E. Magee, for the plaintiffs. *Messrs. Charles S. Baker*, and *Francis X. Poynton* were on the brief.

Mr. Raymond T. Nagle, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. David B. Hochstein* was on the brief.

The court made special findings of fact as follows:

1. The plaintiffs, Frank Paul Ross and Earl Alexander Ross, are brothers and citizens of the United States. They

*Argued November, 1943.

brought these actions under two acts of Congress approved May 29, 1936, being 49 Stat. 2307, Chapter 474, and 49 Stat. (Pt. 2), 2307, Chapter 475, respectively. Except for the names of the plaintiffs, the Acts are identical, the first one reading as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon the claim of Frank P. Ross, of Tacoma, Washington, against the United States, for damages arising out of the patenting to another person of lands in Pacific County, Washington, which had been selected or entered by said Frank P. Ross under the homestead laws, and for damages arising out of the subsequent cutting of timber from such lands.
>
> SEC. 2. Suit upon such claim may be instituted at any time within one year after the date of enactment of this Act, notwithstanding the lapse of time or any statute of limitations. Proceedings for the determination of such claims, and appeals from and payment of any judgment thereon shall be in the same manner as in the case of claims over which said Court has jurisdiction under section 145 of the Judicial Code, as amended.

The cases were heard together and, except as otherwise indicated, the following findings are applicable to both.

2. The land upon which the claim of Frank Paul Ross is based is the West ½ of NW¼, SE¼ of NW¼, and NW¼ of SW¼, Sec. 32, T. 15 N., R. 6 W., W. M., Pacific County, Washington.

3. The land upon which the claim of Earl Alexander Ross is based is the North ½ of NE¼, the SW¼ of NE¼, and NE¼ of NW¼, Sec. 32, T. 15 N., R. 6 W., W. M., Pacific County, Washington.

4. By Act of Congress dated February 14, 1859, 11 Stat. 383, the State of Oregon was granted certain lands for public-school purposes. After most of the land had been taken up by settlers under sales by the State, Congress by an Act approved March 3, 1891, 26 Stat. 1103, authorized the President to create forest reservations, and a subsequent Act approved June 4, 1897, 30 Stat. 36, contained the following provision:

In cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent.

Pursuant to the provisions of the Act of June 4, 1897, C. W. Clarke on April 10, 1899, filed lieu selection 490 (Seattle 03482) with the Register and Receiver of the General Land Office at Olympia, Washington, relinquishing the W½, Sec. 36, T. 17 S., R. 9 E., W. M., Crook County, Oregon, and selecting in lieu thereof the E½, Sec. 32, T. 15 N, R. 6 W., W. M., Pacific County, Washington.

On the same day, April 10, 1899, Clarke also filed lieu selection No. 492 (Seattle 03480) with the Register and Receiver of the General Land Office at Olympia, Washington, relinquishing the E½, Sec. 36, T. 12 S., R. 9 E., W. M., Crook County, Oregon, and selecting in lieu thereof the W½, Sec. 32, T. 15 N., R. 6 W., W. M., Pacific County, Washington.

The lands in Crook County, Oregon, hereinafter referred to as the base lands, were within the limits of the Cascade Range Forest Reservation and were conveyed by Clarke to the United States by deed dated October 13, 1898.

The base land for Clarke's lieu selection No. 490 was included in the application of purchase made by one S. Anderson to the State of Oregon on August 17, 1898. After the state had issued certificate of title, it was assigned on August 26, 1898, to J. H. Schneider, to whom the state issued a patent. Clarke obtained title by deed from Schneider.

The base land for Clarke's lieu selection No. 492 was included in the application of purchase made by one S. D. Sandridge to the State of Oregon on August 22, 1898. The state issued certificate of title the same day. September 20, 1898, the certificate was assigned to Clarke, and the State of Oregon issued a patent to Clarke on October 7, 1898.

Clarke's lieu selections in Pacific County, Washington, embraced the two tracts of land upon which plaintiffs later settled.

5. The Register and Receiver of the land office first rejected the selections on the ground that the lands were unsurveyed, and on April 21, 1899, Clarke filed a motion for review of this action. His attorney in this proceeding was F. A. Hyde, who will be hereinafter referred to, but Hyde did not thereafter act as Clarke's attorney in proceedings before the General Land Office. Subsequently, by decision approved June 9, 1899, the selections were accepted and approved by the Commissioner of the General Land Office but no patents were issued because the land was then unsurveyed.

6. August 18, 1901, Jay D. Dean filed with the Register and Receiver of the land office at Olympia a protest against the acceptance of Clarke's lieu selections 490 and 492, on the ground that Dean was a settler on a part of the land embraced therein prior to the date the selections were made. July 3, 1903, John S. Bennett, guardian for Henry Bennett, an insane person, filed a homestead application with the Register and Receiver of the land office at Olympia, alleging that Henry Bennett had settled upon a portion of the land covered by lieu selection 490 in 1895, a date prior to the selection by Clarke, and that Bennett continued to reside thereon until he became insane in 1901.

Hearings were held under the direction of the General Land Office to determine the rights of the contestants and the lieu selector. October 20, 1904, and October 22, 1904, respectively, the Commissioner of the General Land Office rendered decisions in favor of the contestants on the determination that the tracts claimed by them were not vacant and therefore not subject to selection when Clarke's selections were filed. By this action, selections 490 and 492 were cancelled with respect to all of the land covered thereby, except the tracts claimed by the plaintiffs, Frank Paul Ross and Earl Alexander Ross.

7. November 21, 1902, the Commissioner of the General Land Office, hereinafter called the Commissioner, ordered that Clarke's lieu selections 490 and 492 be suspended "because of alleged irregularities," but the record does not disclose what prompted such action at that time.

8. February 17, 1904, an indictment was returned and filed against Frederick A. Hyde, John A. Benson, Henry P. Dimond, and Joost H. Schneider in the Supreme Court of the District of Columbia in Criminal Case No. 24141, which in substance alleged:

Hyde and Benson and their employees, Dimond and Schneider, unlawfully conspired together, with other unknown persons, to defraud the United States out of large tracts of public land of the United States open and to be opened to selection in lieu of lands within forest reserves established and to be established in California and Oregon, by means of false and fraudulent practices whereby Hyde and Benson were to fraudulently obtain from said States school lands lying within forest reserves which were open to purchase from those States by residents thereof upon their sworn applications showing their qualifications to purchase, their intention to purchase in good faith and for their own benefit, and that they had made no contracts to sell the land. Some of the applications were to be made in the names of fictitious persons, and others in the names of persons not desiring or qualified to purchase the lands. In the case of real persons, Hyde and Benson were to procure the use of their names by paying such persons small sums of money and by falsely representing to them that they were merely disposing of their rights to purchase such school lands. As a part of the conspiracy the defendants were to and did make use of false, forged, and fraudulent affidavits supporting such applications for purchase from the States.

In furtherance of the conspiracy, Hyde and Benson were to cause to be assigned and conveyed, by means of false and forged instruments to the United States, either directly through Frederick A. Hyde, or through various agents and attorneys of Hyde, including Crawford W. Clarke and others, the pretended rights of such fictitious persons, as well as the assignments and conveyances of real persons fraudulently obtained. After the school lands had been so fraudulently obtained, Hyde and Benson were to exchange such lands for public lands to be selected by or on behalf of Hyde and Benson, in the names of Frederick A. Hyde, Craw-

ford W. Clarke (under the designation of C. W. Clarke) and others, as would most conveniently serve the purpose of the conspiracy.

Schneider, as an employee of Hyde and Benson, was to assist them by obtaining in the States of California and Oregon fictitious affidavits and affidavits of real persons who would permit their names to be used, for the purpose of acquiring school lands in those States.

Hyde and Benson were to take advantage of the fact that they had bribed certain employees in the General Land Office in Washington corruptly to furnish information concerning and to expedite matters pertaining to the business of the conspiracy that were pending in that office. They were also to take advantage of the fact that they had bribed a forest superintendent and forest supervisor in the employ of the Department of Interior to make recommendations to their superiors for including or not including lands in a forest reserve as would serve the interests of the conspirators.

Dimond, as attorney for Hyde and Benson, was to assist the conspiracy by appearing before the appropriate officers of the Department of the Interior and General Land Office from time to time to urge speedy action by those officers upon matters affecting the business of the conspiracy.

The bill of particulars which the United States filed in said criminal cause contained a list of the school lands which the United States alleged were fraudulently obtained from the States of California and Oregon. The list included the two tracts of land in Crook County, Oregon, which C. W. Clarke offered as the base for his lieu selections Nos. 490 and 492, as stated in finding 4.

After a demurrer to the indictment had been overruled and the ruling affirmed by the Court of Appeals for the District of Columbia, a trial was had and the verdict of the jury returned on January 20, 1908. Benson and Dimond were acquitted, but Hyde and Schneider were found guilty. Hyde was sentenced to two years' imprisonment and to pay a fine of $10,000, and Schneider was sentenced to imprisonment for one year and two months and to pay a fine of $2,000. Their conviction and sentence were affirmed by the Court of Appeals (*Hyde* v. *United States*, 35 App. D. C. 451),

and on June 10, 1912, the Supreme Court affirmed the judgment of the lower court, *Hyde* v. *United States*, 225 U. S. 347.

Excerpts from the original indictment and a summary of the proceedings in the criminal case are in evidence as Plaintiff's Exhibit No. 2, which is made a part hereof by reference.

Frederick A. Hyde, one of the defendants convicted in said case, is the F. A. Hyde who on April 21, 1899, as stated in Finding 5, acted as Clarke's attorney in the proceeding before the General Land Office regarding Clarke's selections Nos. 490 and 492. Joost H. Schneider, also convicted in said criminal case, is the J. H. Schneider who conveyed the base land in Oregon to Clarke which the latter exchanged for his lieu selection No. 490, as described in finding 4. Crawford W. Clarke who was referred to in the indictment is the C. W. Clarke mentioned in other findings.

9. November 12, 1908, after Hyde and Schneider had been convicted in the criminal case described in finding 8, the Commissioner directed the Chief of his Field Division at Portland, Oregon, to make an investigation and report regarding Clarke's lieu selection 490. March 10, 1909, Special Agent West made a written report to the Commissioner stating that he had been unable to locate S. Anderson who had purchased the base land in Oregon which Clarke exchanged for lieu selection 490, but that the Notary Public who took Anderson's affidavit would testify that he was approached by an unknown person who employed him to get three persons to sign purchase applications for Oregon school land; that the assignment from Anderson was in blank and that the unknown person instructed him to insert the name of J. H. Schneider as assignee; that the three applicants obtained by the Notary had no intentions to purchase the land but signed the papers on the Notary's request and promise that they would be paid therefor. The special agent recommended that the selection be cancelled on the ground that the base land had been fraudulently acquired from the State of Oregon.

December 8, 1909, the Commissioner, on the basis of Agent West's report, directed the Register and Receiver of the

General Land Office at Olympia, Washington, to begin proceedings for the cancellation of Clarke's lieu selection 490, but on March 11, 1911, before hearings were held, he ordered the proceedings withheld, pending the receipt of a supplemental report which the Commissioner had requested because Agent West's report did not show that Clarke had knowledge of the fraud perpetrated on the State of Oregon.

10. July 31, 1912, and January 7, 1914, C. R. Arundell, Special Agent of the General Land Office at Portland, Oregon, submitted to the Commissioner written reports on the results of the Agent's investigations concerning Clarke's lieu selections 490 and 492, respectively. These reports, which contained excerpts from the testimony in Criminal Case No. 24141 in the Supreme Court of the District of Columbia and set forth the operations of the conspiracy in detail, are summarized as follows:

In 1898 Frederick A. Hyde conceived the idea of securing state lands within the limits of the Cascade Forest Reserve in Oregon and exchanging them for other lands outside the reserve, under the Act of June 4, 1897, pursuant to which he sent his agent Schneider to Oregon for the admitted purpose of interesting persons in applying for the purchase of the lands. Schneider secured a number of "dummy applications," including the applications of S. Anderson and S. D. Sandridge. The application of S. Anderson (used to purchase the base land for selection 490) was obtained by the notary who was acting for Schneider, and the Special Agent's efforts to locate Anderson were unavailing. The application of S. D. Sandridge (used to purchase the base land for lieu selection 492) was in the handwriting of J. H. Schneider, and the deed of assignment from Sandridge was in the handwriting of F. A. Hyde. After a careful search of directories and other sources did not reveal any trace of Sandridge, the Special Agent concluded that he was a fictitious person. Arundell stated that his investigations established that Schneider's operations were illegal and fraudulent, and although Hyde denied actual knowledge of the fraud, the Special Agent declared that the knowledge of the agent Schneider was imputed to Hyde, his principal.

Clarke's participation in the transactions was as financier

for Hyde, to whom Clarke loaned some sixty-four thousand dollars. Title to a portion of the base land was taken in Clarke's name for the dual purpose of concealing Hyde's operations and as security for the money advanced. Clarke agreed that Hyde could dispose of land held in the former's name, and Hyde and Benson then entered into a contract in which it was agreed that Benson would sell the selection rights received in exchange for the base lands and that after Clarke had been paid the amount advanced by him, plus interest, the profits would be divided between them. The Special Agent concluded that since Clarke's only interest in the selections was that of a mortgagee, a trust had been created in which Clarke was the trustee and Hyde the cestui-que trust. No evidence was secured showing that Clarke had actual knowledge of the fraud in obtaining the base lands, but the Special Agent stated it was not necessary to prove actual notice, since the beneficiary Hyde had knowledge of the fraud and such knowledge would be constructive notice to the trustee Clarke. The reports closed with the recommendation that adverse proceedings be started for the cancellation of Clarke's lieu selection No. 492, and that the charges in the proceedings already begun with respect to lieu selection No. 490 be amended, naming Clarke as the selector and Hyde as the real party in interest.

11. Other investigations requested by the Commissioner resulted in reports being made to him on April 3, 1912, respecting selection 492 and on February 13, 1914, regarding selection 490, in which it was stated that no evidence of settlement on the land (i. e., that portion left after the decisions in favor of Dean and Bennett, finding 6) prior to the date of Clarke's selections was found except for one individual who had conveyed his interest to Clarke before the selections were made.

12. The plaintiffs first went to Pacific County, Washington, in the latter part of June 1913, during the period when Clarke's lieu selections were being investigated by the General Land Office. They helped their mother build a cabin on a quarter section she was homesteading on Section 28 in the same township where the tracts of land upon which plaintiffs later settled were located. While there they heard the

rumors which were prevalent in the community regarding the fraud practiced in obtaining the base lands in Oregon which were exchanged for Clarke's lieu selections in Pacific County. At that time Earl Alexander Ross was 24 years of age and Frank Paul Ross was 23 years of age; they were both citizens of the United States. They learned that the two quarter sections of land, upon which their claims are based, were then unoccupied and that there was nothing of record against the land except Clarke's lieu selections. Believing that the lieu selections would be canceled, they decided to homestead the two tracts.

13. Late in July or the first part of August 1913, plaintiff Frank Paul Ross purchased a cabin, clearing, and any other rights owned by James McAllister in the tract of land out of which plaintiff's claim arises, with the agreement that McAllister would appear as a witness for him when a hearing was granted by the General Land Office and would at that time furnish a relinquishment (apparently a quitclaim of any rights acquired) which McAllister had purchased from a former settler who had built a cabin there in 1897.

14. In July or August 1913, plaintiff, Earl Alexander Ross purchased a cabin located on the land claimed by him from Frank Martin for $50 with the agreement that Martin would later supply him with the necessary proof that the land was procured through the use of a fraudulent script and was not vacant at the time the lieu selection was filed.

15. Immediately after purchasing the cabins, plaintiffs began living on the land and after they had ascertained its boundaries from markings left by Government surveyors, they traversed each of the 40-acre parcels embraced in their claims. They then posted six written notices on each tract stating that they were claiming them as their homesteads.

16. Sometime between August 15 and September 15, 1913, plaintiffs tendered to the Register and Receiver of the General Land Office at Olympia, Washington, their written applications, with accompanying affidavits and filing fees, for entry upon the two tracts of land under the homestead laws. They were advised that the applications could not be accepted because the lands were not open to homesteading in view of the previous selections made by Clarke. From in-

formation previously obtained from settlers who had contested Clarke's selections, plaintiffs had anticipated this action and thereupon they handed the Register and Receiver written protests against the approval of Clarke's selections, charging that the base lands which were exchanged for the lieu selections were fraudulently acquired and that the lands were not vacant at the time the selections were filed, and requesting hearings on their contests. These papers were left for filing with the understanding that plaintiffs would be given notice when hearings were ordered.

17. From July or August 1913, when they first occupied the land, until their entrance into military service in 1917, plaintiffs resided thereon under the following circumstances:

Plaintiffs each had a habitable cabin about 16 feet long by 12 feet wide, which had two windows and one door and was equipped with home-made furniture. While they were on the land, plaintiffs slept in their cabins and prepared their meals there. On the clearings where the cabins stood, plaintiffs each cultivated a half acre garden plot where he raised vegetables for his own use. They received their mail at the rural post office in the township.

The land was heavily timbered and produced no income. Plaintiffs were both poor men and were compelled to work away from it to earn a living. They were both bachelors and had no relatives or dependents living with them on their homestead claims.

Earl Alexander Ross was employed as a meat cutter in Aberdeen and Tacoma, Washington, by various employers for periods of from four days to five weeks at a time. During the period stated above, he was on the land an average of one day each thirty days and sometimes remained there continuously for four or five days. He voted at a school election in the township in 1914 and in the general election in 1916.

Frank Paul Ross worked at odd jobs in nearby towns or for his neighbors for periods of from two weeks to three months at a time. His longest continuous residence on the land was for 11 or 12 months. He was absent from his homestead claim from one-third to one-half of the time

from the date of first occupancy until his enlistment in the Navy in 1917.

During the period first referred to above, neither of plaintiffs maintained a home or established a fixed place of residence at any place except their homestead claims, and neither was continuously absent therefrom for as long as six months.

Plaintiffs did not fence the land and, except for their gardens and clearings, they did not farm or cultivate it or keep livestock there.

18. About January 11, 1914, plaintiffs cut down a large tree on the land occupied by their mother. Due to a gust of wind, the tree fell in an unexpected direction so that one of the limbs broke through the cabin occupied by a Mrs. Vanderpool who was homesteading the same tract of land and claiming it adversely to Mrs. Ross. The fall of the tree injured no one and caused only slight damage to the cabin.

Two days later, while plaintiffs were spending the night in the mother's cabin, a group of heavily armed, masked men, referred to in the evidence as the Night Riders, approached the cabin after dark, fired several shots through the roof and required the occupants to come out with their hands up. After forcibly removing them to a point several miles away the Night Riders threatened to hang them on the spot unless plaintiffs and their mother would agree to leave the country and never return. Under the circumstances, plaintiffs and their mother accepted the terms imposed but later filed charges against some of the men whom they recognized at the time. During the trial, which resulted in the acquittal of one defendant and the dismissing of charges against the others, plaintiffs were advised by special agents of the General Land Office then investigating Clarke's lieu selections, that plaintiffs' lives would be endangered if they returned to the homestead claims, and that since they had been forcibly ejected from Government land, further residence thereon was not necessary to preserve any rights previously acquired by them.

After the trial, plaintiffs returned to the land and continued to reside there in the manner described in the preceding find-

ing, but on January 16, 1917, Earl Alexander Ross executed an affidavit which was filed with the General Land Office in which he described the action of the Night Riders, told of the advice given by the special agents and stated that his life would be endangered by further residence on the land. For these reasons, he stated that he could not continue residence on his homestead but that he had not abandoned and did not intend to abandon the same. The description of his homestead in the affidavit does not correspond with that set out in his amended petition but is the same as given in his original petition.

There is no proof that the action of the Night Riders was instigated by the lieu selector Clarke or by anyone acting for him.

19. Plaintiff, Frank Paul Ross, entered the service of the United States Navy on the day the United States declared war against Germany in 1917, and plaintiff Earl Alexander Ross was inducted into the United States Army from Pacific County, Washington, on September 18, 1917.

In December 1917, while serving in the Army, Earl Alexander Ross executed an affidavit which was filed with the Register and Receiver of the General Land Office at Seattle, Washington, stating that he was absent from his homestead because of military service.

May 21, 1917, while Frank Paul Ross was at sea with the Atlantic Fleet of the Navy, he executed an affidavit which was afterwards received by the General Land Office, stating that he would be unable to attend further to his duties as a homesteader until discharged from the Navy.

20. From 1913 to 1920, plaintiffs, individually, through their mother, and through an attorney who represented them from 1915 to 1920, made efforts to obtain hearings on the applications which they had theretofore filed with the General Land Office. In 1914, plaintiffs received letters from the General Land Office in Washington, D. C., in which they were informed that the Government had instituted proceedings for the cancellation of Clarke's lieu selections and that no action would be taken on plaintiffs' contests until the Government's case was concluded. In 1915, plain-

tiffs were advised by the Register and Receiver at Seattle that the Government was still investigating the matter.

In 1919, plaintiffs' attorney wrote several letters to the Commissioner requesting information which the attorney stated he desired to use in establishing the fact that the base land was illegally secured from the State of Oregon. The Commissioner replied to these letters, stating that the Government had started proceedings for cancellation of the lieu selections but had suspended action pending the termination of a suit filed by the State of Oregon for recovery of the base lands. He further stated that forest lieu selections were not subject to contest by private parties upon a charge that the base lands had been fraudulently acquired.

No hearings were ever granted by the General Land Office on the applications filed by plaintiffs.

Plaintiffs realized that their entry upon the land was not sufficient to comply with the homestead laws, because their homestead applications were not accepted by the General Land Office. However, they occupied and resided on the land in the manner heretofore described upon the theory that if their protests against the lieu selections resulted in the cancellation thereof, they would be entitled to a preference right to acquire the tracts as their homesteads.

21. During the period from 1902 to 1920, the General Land Office disposed of various applications for entry on the lands here involved and various protests against the lieu selections. Among these was the protest of James McAllister who, as stated in finding 13, sold his interest in the land to plaintiff, Frank Paul Ross. In all cases where the applicant did not allege settlement on the land prior to the date the lieu selections were filed, the Commissioner dismissed the applications without a hearing. After referring to the fact that the Government itself had started action for cancellation of the lieu selections, he ruled that there was no statutory right to contest forest lieu selections and that, even if the contestants were successful, they would not thereby gain a preference right of entry upon the land.

22. After the receipt of the Arundell reports, which are summarized in finding 10, the Commissioner on May 22, 1914, and June 24, 1916, respectively, ordered proceedings

started for the cancellation of Clarke's lieu selections 490 and 492. January 21, 1920, the Commissioner ordered that these actions and numerous others, which arose out of the Hyde-Benson conspiracy and which were then pending in eight States, be consolidated for the purpose of taking testimony. The adverse proceedings were suspended pending a suit which had been instituted by the State of Oregon for the recovery of the base lands.

23. On August 13, 1913, the State of Oregon filed suit in the Circuit Court of Crook County, Oregon, against Hyde, Clarke's assignee, and others for cancellation of the State deeds to the base lands on the ground that they were obtained in fraud of the public policy of the State. The United States refused to make itself a party to said suit, and on appeal, the Supreme Court of Oregon, on January 8, 1918, held that the conspiracy was clearly proved and that Clarke was a party thereto. However, with respect to all of the base lands which had been conveyed to the United States in exchange for lieu selections (including the land involved here), the court dismissed the State's complaint on the ground that the court was without jurisdiction to determine the controversy in the absence of the United States as a party (*State* v. *Hyde*, 169 Pac. 757).

24. In April 1920, the Attorney General of Oregon and the attorney for the lieu selector wrote the Commissioner and the Secretary of the Interior proposing settlement of the controversy on the basis of a compromise whereby the selector had agreed to pay the State $7.50 per acre for the base lands, and the State had agreed to quitclaim its interest in such lands to the United States.

May 3, 1920, the First Assistant Secretary of the Interior wrote the Commissioner, referring to the proposal for settlement and stating that the proposed method of adjustment would apparently meet the objection interposed by the United States against the title to the lands. He stated that if the State would submit quitclaim deeds for the base lands, the title would be regarded as quieted in the Government and the selections approved. Accordingly he directed the Commissioner to suspend the proceedings then pending against the selections where the only objection was the alleged invalidity of the

title to the base lands procured from the State of Oregon, and to call upon the State for the quitclaim deeds.

July 24, 1920, the State of Oregon executed and thereafter delivered to the General Land Office quitclaim deeds conveying to the United States its interest in 320 acres out of the two tracts of base land relinquished by Clarke in exchange for his lieu selections 490 and 492.

On September 7, 1920, and September 10, 1920, respectively, the Commissioner dismissed the adverse proceedings against the selections, and on January 22, 1921, he approved Clarke's selections for patent.

February 4, 1921, the United States issued patents to C. W. Clarke covering the 320 acres of land in lieu selections 490 and 492 upon which plaintiffs' claims are based.

25. March 19, 1919, plaintiff, Earl Alexander Ross, was honorably discharged from the Army. He was wounded in the war and on October 3, 1919, he executed an affidavit which was received at the Seattle office of the General Land Office October 11, 1919, stating that he was unable to live on the land claimed as his homestead because of the wounds which he had received during the war and that he could not return to the claim until he had further recovered from the effects of the wounds. He did not reside on the land thereafter.

26. December 21, 1918, plaintiff, Frank Paul Ross, was honorably discharged from the Navy, and in January 1919 returned to his homestead claim. After spending a short time there, he secured a position in Tacoma, Washington. He spent his holidays on the land and was there once in every four or five months up to January 1, 1921. He learned that a patent had been issued to Clarke and did not thereafter return to his homestead claim.

27. June 17, 1924, the Chief of the Field Division of the General Land Office made written reports to the Commissioner on the results of investigations which the latter had ordered because of an affidavit which was filed with him by Mrs. Margaret M. Ross, mother of plaintiffs. The affidavit, which was dated October 27, 1921, and complained against the action of the Department of Interior in approving Clarke's lieu selections for patent, stated that plaintiffs

had settled on the land and that the lieu selections should have been cancelled because of the fraudulent acquisition of the base lands.

The two reports were similar and reviewed the various transactions affecting the lieu selections which have been described in the preceding findings. The reports called attention to the fact that the General Land Office had previously determined that the two tracts of land were open to lawful selection at the time Clarke's selections were filed and stated that the claims of plaintiffs had originated many years after the selections were filed. The report on selection 492, in substantially the same language as the other report, closed with the following:

> The premises considered, the matter resolves itself into these questions:
> The Department having knowledge of the defects in the titles to the base, which defects were of a fraudulent nature, did the Department have authority to accept a conveyance from the State which sought to remedy the defects in the base title for a consideration of $7.50 per acre which may be interpreted as the market value for similar State lands at the time of the conveyance? If the Department had authority to accept the conveyance, did the Department have authority to accept the conveyance and give it a retroactive value, that is to say, to cure the defects as of the date of the selection?
> By the Department's action in dismissing the adverse proceedings and issuing the patent herein, the Department has effectively answered both inquiries in the affirmative. * * * I recommend that the complaint be dismissed and the case closed.

September 3, 1924, the Commissioner approved the reports and dismissed the complaints of Mrs. Ross, stating that the action taken by the Department of Interior was not a proper subject for review by the General Land Office.

28. On the date the patents were issued to Clarke, the topography of the lands upon which plaintiffs' claims are based was rough and broken, and cut by small gulches. They were covered with a good stand of merchantable timber, including fir, spruce, cedar, and hemlock, which was cut and removed between April 1929 and the latter part of 1931. The greater portion of the land was not suitable for

agricultural purposes, although there were small areas which could have been cleared and used as orchard and cropland.

29. February 4, 1921, the date the Government issued its patent to Clarke, the fair market value of the land on which the claim of plaintiff, Frank Paul Ross, is based was $33,802.00.

30. February 4, 1921, the date the Government issued its patent to Clarke, the fair market value of the land on which the claim of plaintiff, Earl Alexander Ross, is based was $29,380.00.

The court decided that the plaintiffs were not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

These cases come before the court by special acts of Congress which differ only in the names of the plaintiffs and the descriptions of the land. The acts are otherwise identical and, therefore, the two cases will be treated together, and one of the acts is set out in the findings.

These acts provide a forum for the adjudication of the claims on applicable legal principles. The defendant's liability must be established by evidence. *Butler Lumber Company* v. *United States*, 73 C. Cls. 270; *Radel Oyster Company* v. *United States*, 78 C. Cls. 816.

The facts in one case parallel those in the other.

The lands in controversy are located in Pacific County, State of Washington, being 160 acres, or a quarter section, to each plaintiff, a total of 320 acres.

The chain of title to these tracts is briefly as follows: By the Act of Congress dated February 14, 1859, 11 Stat. 383, the State of Oregon was granted certain lands for public-school purposes. These became known as "school" lands. Many of them were sold by Oregon to settlers, and Congress having authorized the creation of forest reservations, an Act of Congress, June 4, 1897, 30 Stat. 36, permitted the settler or owner of lands within the forest reservation to select in lieu thereof "a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent."

The school lands thus used as a basis for a new selection are otherwise known as "base" lands, and the selected lands "lieu" lands.

On April 10, 1899, C. W. Clarke filed selections with the Register and Receiver of the General Land Office at Olympia, Washington (referred to as the Register), in lieu of base lands of equivalent area in a forest reservation in Oregon, the lieu selections comprising the entire section of 640 acres which subsequently the plaintiffs were to enter as homesteaders of 320 acres thereof, being 160 acres apiece.

Clarke's lieu selections were numbered 490, being the east half of section 32, and 492, the west half of section 32, the land claimed by plaintiff Frank Ross being entirely in Clarke's selection 492 and that by Earl Ross being partly in selection 492 and partly in 490.

Clarke received his title to base lands for selection 492 by patent from the State of Oregon. The application to purchase them was originally made by one S. D. Dandridge August 22, 1898, to whom the State of Oregon immediately issued a certificate of title. September 20, 1898, this certificate was assigned to Clarke, to whom the State on October 7, 1898, issued the patent.

Clarke's title to the base land for lieu selection 490 was derived differently. This base land was the subject of an application August 17, 1898, by S. Anderson, to whom the State of Oregon issued its certificate of title. Shortly thereafter, August 26, 1898, the certificate was assigned to J. H. Schneider, to whom the State issued its patent. Clarke obtained title by deed from Schneider.

Clarke thus held title to the base lands by or through patents from the State of Oregon.

Ultimately, on February 4, 1921, the United States, after extended proceedings, recited in the special findings of fact, issued patents to Clarke covering the 320 acres of lieu lands which are here the subject of claim by the plaintiffs, and at no time have documentary evidences of title issued from State or Federal government to the plaintiffs, nor have they derived title from anyone to whom such muniments of title have issued.

Plaintiffs' claims are based on the invalidity of the Clarke lieu selections, and their own preferential right to acquire the tracts in question as their own homesteads.

The facts relating to the lieu selections by Clarke are set forth in some detail in the findings. November 21, 1902, The Commissioner of the General Land Office suspended the lieu selections for alleged irregularities, and on February 17, 1904, an indictment was returned and filed against Frederick A. Hyde, John A. Benson, Henry P. Dimond, and Joost H. Schneider in the Supreme Court of the District of Columbia, charging them with conspiracy to defraud the United States out of large tracts of public land through fraudulent purchases of base lands included in which were the tracts offered as the base for Clarke's lieu selections 490 and 492. The Schneider so indicted was Clarke's grantor of the base land for selection 490. The Hyde so indicted had as attorney for Clarke filed a motion in the General Land Office in April 1899 to review a rejection by the Register of Clarke's selections, the Register being of the opinion that the selections were not in order because the lieu lands were unsurveyed. This rejection was reversed June 9, 1899, the selections accepted and approved by the Commissioner of the General Land Office, but no patents were then issued because the lands were still unsurveyed. Hyde's connection as attorney for Clarke before the General Land Office was terminated immediately after the motion for review was filed.

Hyde and Schneider were convicted, Benson and Dimond acquitted. After the conviction the General Land Office conducted further investigations of Clarke's lieu selections 490 and 492. It was during this extended period of investigation that the plaintiffs settled on the lands they now claim, and which were part of Clarke's lieu selections. There appear to have been no claimants to the land adverse to themselves except Clarke. However, there had been previous settlers, but from them the plaintiffs secured relinquishment of all rights to the land.

Shortly after the plaintiffs made their physical entry upon the land they tendered applications with the General Land Office for entry under the homestead laws. The Register refused to receive them because of Clarke's prior lieu selections.

Plaintiffs thereupon filed with that Office protests against approval of Clarke's lieu selections, with request for a hearing. No hearings were ever granted plaintiffs on their applications.

The history of plaintiffs' occupation of the lands in dispute is related in the findings and is not necessary here to review.

The plaintiffs were persistent in keeping their contest before the General Land Office. That Office pursued investigations for some years, although in ruling upon applications the validity of the Clarke selections appears to have been generally presumed except as to prior entries. It is to be noted that plaintiffs' entries postdated the Clarke selections.

On August 13, 1913, the State of Oregon filed suit in the Circuit Court of Crook County, Oregon, against Hyde, Clarke's assignee, and others for cancellation of the State deeds to the base lands on the ground that they were obtained in fraud of the public policy of the State. The case found itself on appeal in the Supreme Court of Oregon, which on January 8, 1918, held that conspiracy was clearly proved and that Clarke was a party thereto. The United States, however, had refused to become a party to any of the proceedings, and in consequence the court dismissed the State's complaint as to the base lands that had been conveyed to the United States in exchange for lieu selections, and this dismissal involved the lands embraced in the present suit by the Ross brothers.

Beginning in April 1920 events proceeded to a more rapid conclusion. The Attorney General of Oregon, the attorney for the lieu selector, the Commissioner of the General Land Office, and the Secretary of the Interior, or his office, appear to have worked out a settlement whereby the lieu selector was to pay the State of Oregon $7.50 per acre for the base lands, and the State of Oregon was to quitclaim its interest in such base lands to the United States.

The upshot of the matter was that on July 24, 1920, the State of Oregon by deed quitclaimed to the United States its interest in the lands in Oregon used as a base for the lieu selections in Washington that embraced the lands claimed by plaintiffs; on January 22, 1921, the Commissioner of the General Land Office approved Clarke's lieu selections for patent,

and on February 4, 1921, the United States issued patents to Clarke covering the 320 acres of Clarke's lieu selections in Washington, which the plaintiffs attempted to homestead and to which they have continuously laid claim.

As the matter now stands with relation to the land in controversy, patents therefor have been issued to Clarke, and the plaintiffs have received no muniments of title, never having gotten beyond the stage of settlement upon the land, securing relinquishments from preceding settlers, tendering applications for entry under the homestead laws, protesting against adverse claimants, and actively making known to the defendant their claims to the lands in question. That they were not allowed to make entry under the homestead laws was due to defendant's officers in the presumed performance of their official duties.

The defendant has not deprived the plaintiffs of any land to which they had any claim of any nature which could be enforced before any tribunal or quasi tribunal. Plaintiffs have no right, title, or interest to any land, legal, or equitable. They simply gambled that the Clarke lieu selection would fail because of the controversies concerning the Oregon base lands and were endeavoring to put themselves in position to first file a homestead claim on the lands by securing the claims of squatters and a temporary residence. No title to the land was gained by their acts under the homestead laws because Clarke had already claimed the land under the lieu selection provision of law and no claim for homestead could be filed on the land. The officers of the Government were within their rights of office, as provided by law, when they refused to receive claims of homestead by the plaintiffs.

In *Putnam* v. *Ickes*, 78 Fed. 2d, 223, 226 (App. D. C. 1935), certiorari denied, 296 U. S. 612, the court said:

> Appellants allege no interest in the occupied and patented lands other than that they are citizens of the United States, and as such have a right to make homestead entries upon the public lands of the United States. There is no principle better settled in our public land law than that a private citizen cannot initiate or acquire under the public land laws of the United States rights in land occupied by others who claim under the United States, even though the claim and occupation be fraudulent and wrongful as against the United States.

We can find no claim of any nature for which the defendant is liable to compensate the plaintiffs in any sum, legally or equitably. We cannot find such a claim as would justify recommending it to the conscience of the Congress.

Plaintiffs are not entitled to recover and their petitions are dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

CALIFORNIA NURSERY COMPANY v. THE UNITED STATES

[No. 44228. Decided October 2, 1944]

On the Proofs

Increased labor costs under the National Industrial Recovery Administration Act; limitation on filing of claim under the Act of June 16, 1934; jurisdiction.—Where in a contract for planting of trees and shrubs at a Naval Air Station plaintiff agreed to replace at his expense all trees and shrubs which might die during a period of 18 months from date of acceptance of the contract work; and where plaintiff complied with this provision of the contract; it is *held* that "the completion of the contract" was not consummated until the end of the 18-month period, which was the forepart of December 1935, and plaintiff's claim, filed March 11, 1935, was timely under the provisions of section 4 of the Act of June 16, 1934 (48 Stat. 974, 975), and the Court of Claims has jurisdiction of the instant suit.

Same; date of acceptance of the contract work.—Where the work under the contract was completed and accepted June 5, 1934, and in the following July and August plaintiff performed replanting work required by the contract; it is *held* that "acceptance of the contract work", within the meaning of the contract, refers to the initial planting and not to replacements of plants dying during the 18-month period.

Same; ascertainment of labor costs.—Where the cost of possible replacements was a part of the contractor's costs of performance of the agreed work, the plaintiff could not ascertain its costs until the 18-month period of replacements had expired.

Same; statutory suit; period of limitation.—Under the statute (48 Stat. 974, 975) the period of limitation for filing claim for increased labor costs due to the enactment of the National Industrial Recovery Administration Act did not start to run until the event happened that determined such costs. See *Austin Engineering Co. v. United States*, 88 C. Cls. 559, 564.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for the plaintiff. *Rhodes, Klephinger & Rhodes* were on the brief.

Mr. S. R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the stipulation entered into between the parties:

1. Plaintiff is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business at Niles, California.

2. On July 31, 1933, plaintiff entered into a contract with defendant, by A. L. Parsons, Chief of the Bureau of Yards and Docks, Navy Department, whereby plaintiff (designated in said contract as "the contractor") agreed, for the consideration of $21,890.00, to furnish all labor and materials, and perform all work required for cultivating, fertilizing, seeding lawns, planting trees and shrubs, and landscaping certain areas at the Naval Air Station, Sunnyvale, California, all in accordance with certain specifications made a part of said contract. Section 1–11 of the Specifications provided as follows:

> 1–11. *Warranty Bond.* That contractor shall warrant all trees and shrubs for a period of 18 months from date of acceptance of the contract work; and he shall, upon notice, promptly replace at his expense all trees and shrubs which die during this period. This warranty shall be covered by a bond (preferably that of a first class surety company) in the sum of 35 per cent of the contract price. This bond shall be furnished before final payment of the contract is made.

At this time, plaintiff was paying its field laborers 25¢ per hour.

3. On August 28, 1933, plaintiff signed the President's Reemployment Agreement which had been issued by the President of the United States on July 27, 1933, pursuant to Section 4 (a) of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 195). The Agreement provided as follows:

> * * * the undersigned hereby agrees with the president as follows: * * *
>
> (6) Not to pay any employee of the classes mentioned in paragraph (3) [any factory or mechanical worker or artisan] less than 40¢ per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 40¢ per hour, in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30¢ per hour. * * *

On July 15, 1929, plaintiff was paying its field laborers not more than 30¢ per hour. Accordingly, pursuant to the Agreement, plaintiff increased the wages of its field laborers from 25¢ per hour to 30¢ per hour.

4. Plaintiff commenced its operations under the contract with the Navy Department on or about September 17, 1933. In the performance of the contract, plaintiff paid its field laborers said rate of 30¢ an hour. No code of fair competition applicable to the nursery industry was ever approved.

5. The work under the contract with the Navy Department was completed by plaintiff, and accepted by defendant, on June 5, 1934. The payment of 30¢ an hour rather than 25¢ an hour to the field laborers resulted, up to the contract completion date of June 5, 1934, in an increased cost to plaintiff in the performance of the contract in the amount of $1,451.87.

6. Pursuant to the aforementioned provisions of Section 1-11 of the Specifications, plaintiff, during the months of July and August, 1934, replaced some trees and shrubs which died. The last of such replacement work was performed on August 6, 1934. The cost of the replacement work performed in July and August, 1934, was increased in the amount of $108.00 by reason of the payment of 30¢ an hour rather than 25¢ an hour to said field laborers.

7. Under the Act of June 16, 1934 (41 U. S. C., secs. 28–31), plaintiff, on March 11, 1935, filed a claim with the Navy Department for increased costs in the amount of $2,-409.10 incurred on its said contract by reason of compliance with the President's Reemployment Agreement. Thereafter said Department transmitted said claim to the Comptroller General of the United States, who disallowed it for the reason, among others, that the claim was not filed within the period required by said Act.

8. On November 7, 1938, plaintiff filed its petition in this Court pursuant to the Act of June 25, 1938 (52 Stat. 1197), in which it claimed $2,382.10 as alleged increased costs incurred by it in the performance of said contract as a result of the enactment of the National Industrial Recovery Act. No other action has been taken on the claim by Congress or any Department of the Government, except as above stated, and no assignment or transfer of the claim or of any part thereof has been made.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the Court:

This action is brought pursuant to the Act of Congress approved June 25, 1938, giving Government contractors the right to sue the United States under indicated circumstances for recovery of increased costs incurred as a result of the enactment of the National Industrial Recovery Act. Submission is on a stipulation of facts and briefs. The facts are not in dispute.

The plaintiff's contract called for planting of trees and shrubs at the Naval Air Station at Sunnyvale, California, and other work there of a landscaping nature.

The contract provided:

> *Warranty Bond.* The contractor shall warrant all trees and shrubs for a period of 18 months from date of acceptance of the contract work; and he shall, upon notice, promptly replace at his expense all trees and shrubs which die during this period. This warranty shall be covered by a bond (preferably that of a first class surety company) in the sum of 35 percent of the contract price. This bond shall be furnished before final payment of the contract is made.

The only question raised that merits serious consideration is jurisdictional. Under the statute, in order that jurisdiction might here attach, the claim must have been presented to the administrative office concerned "within six months from the date of approval of this Act or, at the option of the claimant, within six months after the completion of the contract, except in the discretion of the Comptroller General for good cause shown by the claimant." Sec. 4, Act of June 16, 1934, 48 Stat. 974, 975.

It is stipulated and so found, that the work under the contract was completed and accepted June 5, 1934, and that plaintiff in the following July and August performed replanting work required by the contract, finishing replacements August 6, 1934. It is obvious that "acceptance of the contract work", mentioned in the paragraph under the heading "Warranty Bond," refers to the initial planting, and not to replacements of plants dying during the 18-month period, and the stipulated and adopted finding follows the wording of the contract.

The 18-month period expired the forepart of December, 1935.

The plaintiff filed its claim with the administrative office March 11, 1935, which is more than six months after replanting had been completed August 6, 1934, hence more than six months after June 5, 1934, the acceptance date, but less than six months "after completion of the contract" if, within the meaning of the controlling acts of Congress, the completion of the contract was not consummated until the forepart of December, 1935, the end of the 18-month period.

There is no escaping the fact that replanting was a part of the contract work. The contract provided that it should be done. Without the contract it would not have been done.

Since the cost of possible replacements was a part of the contractor's costs of performance of the agreed work, the plaintiff could not ascertain its costs until the 18-month period had expired.

This is not a suit for recovery of a contract price, due at a time certain and remaining unpaid. It is a statutory suit for recovery of costs and the period of limitation did not start to run until the event happened that determined those

costs. They were ascertainable only at the conclusion of the 18-month period and the claim was therefore presented in time. The cause of action here is statutory and did not accrue piecemeal. In this connection see *Austin Engineering Co.* v. *United States*, 88 C. Cls. 559, 564.

Plaintiff's increased costs resulting from the enactment of the National Industrial Recovery Act in the performance of its contract total $1,451.87, and in the replacement work total $108.00.

Plaintiff is entitled to recover $1,559.87. It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

MADDEN, *Judge*, concurring in part and dissenting in part:

I disagree with the opinion of the court as to the sum of $1,451.87 which is included in the judgment. This sum represents the increased costs incurred by the contractor in performing the contract down to the time when the work was accepted by the Government. Since, as is shown by the findings and the opinion, the work was completed and accepted on June 5, 1934, and the plaintiff's claim under the 1934 act was not filed until March 11, 1935, that claim was filed too late if June 5 was the date of "completion of the contract," within the meaning of that act.

The opinion of the court treats the contract to do the prescribed work, and to warrant life of the trees and shrubs for 18 months, as single, and as keeping performance incomplete until the expiration of the 18 months period of the warranty. I think the warranty should be treated, for this purpose, as a separate and supplementary provision.

The only situation analogous to the present one which the parties have pointed out, is that of the time of the filing of mechanics' liens, under state statutes requiring that, to be effective, they must be filed within a specified period after "the completion of the contract" or "the final performance of the work" or "the last furnishing of labor or material" or words of similar import. All the cases seem to hold that the lien is filed too late, if it is not filed within the specified period

after the work is done and turned over to and accepted by the owner, even though it is filed within the specified period after further work is done by the contractor by way of repair or replacement of defective materials pursuant to an express or implied warranty. See *Bailey Meter Company* v. *Owens-Illinois Glass Company*, 108 Fed. (2d) 468 (C. C. A. 7th); *Taylor Bros.* v. *Gill*, 126 Okla. 293, 259 Pac. 236; *Fox & Co.* v. *Roman Catholic Bishop of the Diocese of Baker City*, 107 Ore. 557, 215 Pac. 178; *Coffey* v. *Smith*, 52 Ore. 538, 97 Pac. 1079; *Hammond Lumber Co.* v. *Yeager*, 185 Cal. 355, 197 Pac. 111; *Holmes* v. *S. H. Kress & Co.*, 100 Okla. 131, 223 Pac. 615; *Otis Elevator Company* v. *Sheffield Realty Co.*, 205 Ala. 488, 88 So. 566; *Garrett* v. *Lishawa*, 36 Ohio App. 129, 172 N. E. 845; *Adelman, Inc.* v. *Church Extension Committee of Presbytery of New York, et al.*, 241 N. Y. Supp. 197, 136 Misc. 810.

For the practical reason that a serious incumbrance on the title to land should not be permitted to spring up after the relatively short period which legislatures set for the filing of these liens, merely because some work supplemental to the work contracted for is done at a later time, the courts in the mechanic's lien cases have treated the warranty as a separate contract. I recognize that there is, perhaps, not an equally strong reason of policy in this N. R. A. case urging toward the same result. But I think that the parties to such a contract really regard the warranty as a supplement to, rather than a part of, the contract, and no reason now occurs to me why an express warranty, such as appears in this case, should be treated differently from the implied warranties which are a part of every contract for construction or for furnishing materials. If there is no difference, the decision of the court in this case might have the effect of reopening N. R. A. cases which have been thought to be outside our jurisdiction because the claims for increased costs were not filed within the prescribed period after the "completion" of the contract in the sense in which I think Congress used that word.

JONES, *Judge*, took no part in the decision of this case.

THE AMERICAN SUGAR REFINING COMPANY v. THE UNITED STATES

[No. 45594. Decided October 2, 1944]

On the Proofs

Excise tax on sugar under the Act of September 1, 1937; effective date.—Where section 406, Title IV, of the Sugar Act of 1937, approved September 1, 1937 (50 Stat. 903), provided that "the provisions of this title shall become effective on the date of the enactment of this Act"; it is *held* that the tax with respect to the manufacture of manufactured sugar, imposed by the Act, was effective "from the first moment of September 1, 1937", as set forth in the pertinent Treasury Regulations, and the plaintiff is not entitled to recover.

Same; apparent conflict of language to be reconciled if possible.—The provisions of Section 402 (c), Title IV, of the Sugar Act of 1937, providing that the manufacturer of sugar "shall file on the last day of each month a return and pay the tax with respect to manufactured sugar manufactured after the effective date of this Title"; and providing, further, that "the first return and payment of the tax shall not be due until the last day of the second month following the month in which this title takes effect", must be interpreted reasonably so as not to conflict, if possible, with the provisions of other sections of the Act with reference to the effective date of the tax.

Same; regulations as to returns and payments under subsection (c).—Subsection (c) of Section 402 was not specifically directed to the imposition of the tax by subsection (a) of that section but was dealing with and directed to the making of monthly returns and payment of the tax so imposed in the months following the date on which the Act became effective.

Same; administrative interpretation.—It is a well established rule that in case of ambiguity or doubt as to the exact meaning of a statute the contemporaneous interpretation or construction thereof by the executive department charged with its administration and enforcement is entitled to great weight, is highly persuasive of the Congressional intent, and should not be disturbed except for the most cogent reasons.

Same; Treasury Regulation reasonable in the instant case.—In the instant case, the interpretation which the Treasury Department gave to Section 402 is a reasonable one, and gives subsection (c) full effect as to its subject matter. See *Mutual Life Insurance Company of New York* v. *Hurni Packing Company*, 263 U. S. 167, 174, 175; *Tasty Baking Co.* v. *The United States*, 93 C. Cls. 667, 674.

The Reporter's statement of the case:

Mr. Abbot Southall for plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.,* for the defendant. *Mr. Fred K. Dyar* was on brief.

Plaintiff seeks to recover $15,571.92 excise tax, and interest thereon, paid November 30, 1937, on sugar manufactured on September 1, 1937. This tax was paid under section 402 of the Sugar Act of 1937, approved September 1, 1937 (50 Stat. 903), and the regulation of the Commissioner thereunder. The question presented is whether the tax was due in respect of sugar manufactured on September 1, the plaintiff contending that section 402 did not become effective until September 2, 1937.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a New Jersey corporation with its office and principal place of business at 120 Wall Street, in the City and State of New York.

2. On November 30, 1937, the plaintiff, under protest, filed with the Collector of Internal Revenue for the Second District of New York its "Monthly Return of Manufacturer of Manufactured Sugar" for the month of September, 1937, disclosing the sale or use during that month of 5,228,142 pounds of manufactured sugar and a resulting tax liability of $25,066.58. That tax was paid by the plaintiff to the Collector of Internal Revenue on November 30, 1937. Of the total amount of tax paid, the sum of $15,571.92 is with respect to sugar manufactured on September 1, 1937, amounting to 2,985,317 pounds.

3. On November 30, 1939, the plaintiff filed with the appropriate Collector of Internal Revenue a claim for refund in amount of $15,571.92, asserting the following grounds therefor:

> The sum for which claim is made was paid with respect to sugar manufactured on September 1, 1937, and the collection thereof is not provided for and is illegal and in direct contravention of the provisions of the

Sugar Act of 1937. The effective date of Title IV of said Act was September 1, 1937, the date of enactment of said Act, and it was specifically provided in said Act that the manufacturer should file a return and pay the tax with respect to manufactured sugar manufactured *after* the effective date of said title. Accordingly, manufactured sugar manufactured on September 1, 1937, was not subject to the tax imposed by said Act.

4. On December 11, 1939, the Commissioner of Internal Revenue notified the plaintiff by registered mail that its claim for refund was thereby rejected. That letter read as follows:

> Reference is made to your claim, filed on Form 843, for refund of $15,571.92, tax alleged to have been erroneously paid under the provisions of section 402 of the Sugar Act of 1937 (superseded March 1, 1939, by section 3490 of the Internal Revenue Code), with respect to sugar manufactured on September 1, 1937, and reported on your Form 1 (Sugar) filed for the month of September, 1937.
>
> You state that the sum for which claim is made was paid with respect to sugar manufactured on September 1, 1937, and the collection thereof is not provided for and is illegal and in direct contravention of the provisions of the Sugar Act of 1937. You state, further, that the effective date of Title IV of said Act was September 1, 1937, the date of enactment of said Act, and it was specifically provided in said Act that the manufacturer should file a return and pay the tax with respect to manufactured sugar manufactured after the effective date of said title. You, therefore, request refund of the amount of tax paid with respect to the sugar manufactured on September 1, 1937.
>
> The tax imposed under the provisions of section 402 of the Sugar Act of 1937 became effective on the first moment of September, 1937. In this connection see Article 200 of Regulations 99.
>
> Since your claim is based on tax paid with respect to sugar manufactured after the first moment of September 1937, it was properly paid. Accordingly, your claim is hereby rejected in full.

5. Various and numerous daily newspapers, financial journals, and other publications issued under date of September 2, 1937, contained news items which stated that the

President had signed the Sugar Act of 1937 late in the evening or night of September 1, 1937.

The official copy of the Sugar Act of 1937 on file in the Department of State does not disclose the hour of September 1, 1937, on which the President signed that Act. Diligent search has failed to disclose any evidence whatsoever as to the hour of September 1, 1937, when the President signed such Act.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The excise tax provisions of Title IV of the Sugar Act, approved September 1, 1937, pertinent to the question whether plaintiff was liable for the tax imposed on sugar manufactured on September 1, 1937, are as follows:

> SEC. 402. (a) Upon manufactured sugar manufactured in the United States, there shall be levied, collected and paid a tax, to be paid by the manufacturer at the following rates:
>
> (1) On all manufactured sugar testing by the polariscope ninety-two sugar degrees, 0.465 cent per pound, and for each additional sugar degree * * * 0.00875 cent per pound additional and fractions of a degree in proportion.
>
> (2) On all manufactured sugar testing by the polariscope less than ninety-two sugar degrees, 0.5144 cent per pound of the total sugars therein.
>
> * * * * *
>
> (c) The manufacturer shall file on the last day of each month a return and pay the tax with respect to manufactured sugar manufactured after the effective date of this title (1) which has been sold, or used in the production of other articles, by the manufacturer during the preceding month (if the tax has not already been paid) and (2) which has not been so sold or used within twelve months ending during the preceding calendar month, after it was manufactured (if the tax has not already been paid): *Provided*, That the first return and payment of the tax shall not be due until the last day of the second month following the month in which this title takes effect.
>
> * * * * *

SEC. 403. (a) In addition to any other tax or duty imposed by law, there shall be imposed, under such regulations as the Commissioner of Customs shall prescribe, with the approval of the Secretary of the Treasury, a tax upon articles imported or brought into the United States as follows:

(1) On all manufactured sugar testing by the polariscope ninety-two sugar degrees, 0.465 cent per pound, and for each additional sugar degree shown by the polariscopic test, 0.00875 cent per pound additional, and fractions of a degree in proportion;

(2) On all manufactured sugar testing by the polariscope less than ninety-two sugar degrees 0.5144 cent per pound of the total sugars therein;

(3) On all articles composed in chief value of manufactured sugar 0.5144 cent per pound of the total sugars therein.

(b) Such tax shall be levied, assessed, collected, and paid in the same manner as a duty imposed by the Tariff Act of 1930, and shall be treated for the purposes of all provisions of law relating to the customs revenue as a duty imposed by such Act, except that for the purposes of section 336 and 350 of such Act (the so-called flexible-tariff and trade-agreements provisions) such tax shall not be considered a duty or import restriction, and except that no preference with respect to such tax shall be accorded any articles imported or brought into the United States.

SEC. 405. (a) * * *

(b) * * *

(c) The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe such rules and regulations as may be necessary to carry out all provisions of this title except section 403.

* * * * *

SEC. 406. The provisions of this title shall become effective on the date of enactment of this Act.

Section 401, the first section of Title IV, related to definitions, and section 404 related to exportation, livestock feed, and distillation.

Treasury Regulations 99, approved by the Secretary of the Treasury and promulgated under Section 402 of the Sugar Act of 1937 provided:

ART. 200. *Effective date.*—The tax is effective with respect to the manufacture of manufactured sugar from

the first moment of September 1, 1937, the date of enactment of the Sugar Act of 1937.

* * * * *

ART. 205. *When the tax attaches.*—(*a*) The tax attaches upon the completion of that process of manufacturing the direct result of which is manufactured sugar. If the completion of the manufacturing process takes place during the period the tax is in effect, the tax attaches, notwithstanding that some part of the manufacturing process took place before such period.

* * * * *

ART. 504. *Records.*—(*a*) *Inventory.*—Every manufacturer of manufactured sugar shall make an itemized inventory of all manufactured sugar held by him, as of the first moment of September 1, 1937. A separate inventory shall be made for each factory, refinery, or other place where such person holds or manufactures manufactured sugar, and a copy of such inventory shall be retained on the premises.

(*b*) *Manufacturing records.*—Every person who on and after September 1, 1937, manufactures manufactured sugar shall keep an accurate record of the manufacturing done by him. A separate record shall be kept at and for each place where the manufacturing is done.

* * * * *

In pursuance of the provisions of section 405 (c) of the Act and other provisions of the internal revenue laws, the foregoing regulations are hereby prescribed.

T. D. 49160, approved by the Secretary of the Treasury (72 Treasury Decisions, Bureau of Customs), promulgated pursuant to Section 403, Sugar Act of 1937, provided:

* * * * *

Pursuant to the authority contained in section 403 (a) of the Sugar Act of 1937 (Public, No. 414—75th Congress, approved September 1, 1937), the following regulations are hereby promulgated * * *.

* * * * *

(b) *Effective date.*—The import compensating taxes prescribed by section 403 are applicable to manufactured sugar and articles composed in chief value of manufactured sugar entered for consumption or withdrawn from warehouse for consumption after the opening of business on September 1, 1937.

* * * * *

In view of all the pertinent language of the act, its apparent purpose, and the interpretive regulations of the Treasury thereunder, we are of opinion that plaintiff's contention that the excise tax imposed by section 402 (a) on manufactured sugar was by section 402 (c) made effective on September 2, 1937, cannot be sustained.

At the outset plaintiff is confronted with the well-established rule that in case of ambiguity or doubt as to the exact meaning of a statute the contemporaneous interpretation or construction thereof by the executive department charged with its administration and enforcement is entitled to great weight, is highly persuasive of the Congressional intent, and should not be disturbed except for the most cogent reasons. Upon consideration of the act as a whole, in the light of its apparent purpose, we think the interpretation thereof by the Treasury was reasonable, and that plaintiff has not overcome this interpretation by the argument that the ordinary meaning of the phrase "sugar manufactured after the effective date of this act" means sugar manufactured on and after the day following the date of approval of the act, and that Congress probably intended by such language to give manufacturers one day within which to appropriately adjust their prices. The language relied upon might mean what plaintiff contends, but whether it does or not depends upon its setting and context. Under plaintiff's argument there is a conflict between subsection (c) of section 402 and section 406 as to the time of imposition of the tax, the latter providing that all the provisions of Title IV shall become effective on the date of enactment of the act, and that date was September 1, 1937. Plaintiff contends, however, that the specific language of subsection (c) must control over the general language of section 406, and that "if the specific language of section 402 (c) were not controlling and given effect, it would be rendered meaningless." In the circumstances we think the rule with reference to specific and general language is not applicable here, nor do we think that a holding that section 406 is controlling as to the time of imposition of the tax renders the mentioned language of subsection (c) meaningless. Reasonably and properly interpreted, both may be rec-

onciled and given full effect according to their apparent purpose. It is well established that this should be done wherever possible. It is admitted that the provisions of section 406 apply to the tax on manufactured sugar as well as imported sugar; it is also admitted that under the language of this section the imposition of the tax on both manufactured and imported sugar became effective from the first moment of September 1, 1937. No reason is shown why Congress would have wished to make a distinction between the time of imposition of the tax on the domestic manufacturer of sugar and on imported sugar. The obvious purpose of the act was to raise revenue, and the purpose of imposing the tax upon imported sugar was to maintain a parity between the sugar derived from both sources and not to subject either to an unequal burden. In view of this, is the language of subsection (c) of section 402 relied upon sufficient, in itself, to overcome the effect and purpose of section 406? We think not. Subsection (c) of section 402 was not specifically directed to the imposition of the tax by subsection (a) of that section, but was dealing with and directed to the making of monthly returns and payment of the tax so imposed in the months following the date on which the act became effective. In the drafting of that section the mind of Congress was apparently on these matters, rather than on the matter of the levy or imposition of the tax, and the language used, i. e., that "The manufacturer shall file on the last day of each month a return and pay the tax with respect to manufactured sugar manufactured after the effective date of this title (I) which has been sold, * * *," doubtless had reference to sugar manufactured after the act became effective or after the effective time of the act. See *Mutual Life Insurance Company of New York* v. *Hurni Packing Company*, 263 U. S. 167, 174, 175. This interpretation which the Treasury gave to the section is a reasonable one, and gives the subsection full effect as to its subject matter. Compare *Tasty Baking Co., a Corporation* v. *The United States*, 93 C. Cls. 667, 674. On the other hand, section 406, while perhaps general as to some matters, was more specific as to the effective date of the imposition of the tax under subsection (a)

of section 402 than was subsection (c). Section 406 must therefore control.

The petition must therefore be dismissed. It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

NOBLE W. JONES v. THE UNITED STATES

[No. 45617. Decided October 2, 1944]

On the Proofs

Pay and allowances; orders under which Army officer performed active duty effective until revoked.—Where the plaintiff, an officer in the Cavalry Reserve, United States Army, in response to orders, dated July 12, 1940, reported for active-duty training on July 31, 1940, and performed active duty until August 19, 1940; and where under date of August 17, 1940, orders were issued revoking the orders of July 12, 1940; it is *held* that during the period of active service the orders were in full force and effect and plaintiff is entitled to recover pay and allowances for such period.

Same.—The orders under which the plaintiff performed active duty for the period in question were effective and enforceable, since they were recognized and enforced by the Army and in order to be terminated required the formal act of revocation. *Chandler* v. *United States*, 70 C. Cls. 690, 694, cited.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Miss Mary K. Fagan, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the agreed statement of facts and the evidence:

1. On June 15, 1930, plaintiff accepted appointment as 2nd Lieutenant, Cavalry Reserve, United States Army, without eligibility for assignment, active duty, or promotion in time of peace. He was promoted to 1st Lieutenant, Cavalry Reserve, United States Army, on October 17, 1934, with the

same restrictions as to active duty and eligibility for assignment or promotion in time of peace and accepted this appointment on October 26, 1934.

2. On September 1, 1939, he was notified by letter from the War Department issued through the Adjutant General's Office at Washington, D. C., that he was reappointed as a 1st Lieutenant, Cavalry Reserve, United States Army, and that under the appointment so issued to him he was not eligible for assignment, active duty, or promotion in time of peace. He accepted this appointment on September 11, 1939, and executed oath of office on that date.

3. On October 17, 1939, he was reappointed 1st Lieutenant, Cavalry Reserve, United States Army, without eligibility for assignment, active duty or promotion in time of peace; and on December 1, 1939, a commission was issued to him appointing him as 1st Lieutenant, Cavalry Reserve, United States Army, in accordance with the notice of reappointment of September 1, 1939, hereinbefore referred to.

4. The plaintiff was advised by his unit instructor from the Headquarters of the First Reserve Area of the Presidio of San Francisco that he was eligible for assignment to active duty and he applied for assignment to active duty on June 20, 1940.

5. The plaintiff, Noble W. Jones, completed an Army extension subcourse in the Cavalry School under date of May 31, 1940, under which he received 22 hours' credit. Army Regulations 140–5, Section 4, providing for promotion and assignment to duty of reserve officers, require the completion of 200 hours' credit, at least 100 of which must be in inactive service, before an officer can be promoted or be placed in an eligible status for promotion or active duty in time of peace.

6. On July 12, 1940, orders were issued directing the plaintiff to proceed to Fort Lewis, Washington, on July 31, 1940, and on arrival there to report to the Commanding General for active-duty training, said duty to continue until August 26, 1940, at which time he would be relieved from active duty and was to return to his home and revert to an inactive status.

7. Plaintiff reported at Fort Lewis, Washington, as directed and performed active duty there until August 19, 1940, when

he was notified that he was not eligible for assignment to active duty and had been erroneously ordered to active-duty training. Under date of August 17, 1940, orders were issued revoking the plaintiff's orders of July 12, 1940.

8. On August 20, 1940, plaintiff requested assignment to active duty in an inactive status and further stated that he was certain he was eligible for assignment to active duty and requested that his record be rechecked to determine his eligibility.

9. The plaintiff was by orders dated August 22, 1940, given inactive-duty credits at the rate of seven hours per day for the period July 31, 1940, to August 19, 1940.

10. On August 20, 1940, the plaintiff, Noble W. Jones, was ordered to active duty, training, and instruction at Fort Lewis, Washington, on an inactive status for the period from August 20 to August 27, 1940.

11. On August 24, 1940, plaintiff was appointed 1st Lieutenant, Cavalry Reserve, United States Army, with full eligibility for assignment to active duty and promotion.

12. On August 26, 1940, competent orders were issued assigning plaintiff to active duty for the period from August 24, 1940, to September 25, 1940; he was again ordered to active duty for the period from October 1, 1940, to September 30, 1941, and has been assigned to active duty since January 10, 1942.

13. Plaintiff performed active duty during the period from July 31, 1940, to August 19, 1940, and was not paid any pay and allowances. He filed claim in the General Accounting Office for the active-duty pay and allowances of an officer of his rank and length of service for said period, which claim was denied by that office.

14. Active-duty pay and allowances of an officer of plaintiff's rank and length of service for the period from July 31, 1940, to August 19, 1940, total $155.44 as computed by the General Accounting Office.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff sues for active-duty pay in the United States Army from July 31, 1940, to August 19, 1940.

While holding a commission as First Lieutenant, Cavalry Reserve, United States Army, under an appointment without eligibility for assignment, active duty, or promotion in time of peace, the plaintiff completed an Army extension subcourse in Cavalry School May 31, 1940. Although he had not yet received sufficient credits entitling him under Army Regulations to eligibility for active duty, his unit instructor from the headquarters of the First Reserve Area, Presidio of San Francisco, advised him that he was eligible for assignment to active duty and he applied for assignment to active duty on June 20, 1940.

On July 12, 1940, orders were issued directing the plaintiff to proceed to Fort Lewis, Washington, on July 31, 1940, and on arrival there to report to the Commanding General for active-duty training, to continue until August 26, 1940, at which time he would be relieved from active duty, return to his home, and revert to an inactive status.

Plaintiff complied with the orders and performed active duty until August 19, 1940, at which time he was notified that he had been erroneously ordered to active-duty training, because he was not eligible for assignment to active duty, and his orders were revoked. Subsequently, and within a week, he received an appointment, with full eligibility for assignment to active duty and promotion. The General Accounting Office has denied plaintiff any pay and allowances for the period July 31, 1940, to August 19, 1940, which amount to $155.44.

While it is true that the orders in question were revoked, it is also true that during the period of service, July 31, 1940, until August 19, 1940, they were in full force and effect. If they had not been in full force and effect, that is to say, if they had been null and void from the beginning, there would have been nothing to revoke. It was under existing orders that plaintiff served, and while the orders were alive and in force, as they were, plaintiff was entitled to active-duty pay. This Court cannot say the orders were void *ab initio*, merely because they were not in alignment with regulations. They were in effect until they were revoked, were enforceable, and were in fact enforced. They were recog-

nized and enforced by the Army, and in order to be terminated, properly required the act of revocation.

It may not be said that plaintiff was serving during the period July 31, 1940, to August 19, 1940, on active duty in an inactive status. It required a new order, and a new order was issued August 20, 1940, to do just that. But plaintiff actually did active duty, and the only order in existence had placed him in an active, not inactive, status.

In *Chandler* v. *United States*, 70 C. Cls. 690, 694, the Court held that the military services there performed, having been performed in good faith and according to orders of the proper officials, entitled the officer to pay, regardless of a question of the validity of his commission, raised after performance of services.

Plaintiff is entitled to recover, and it is so ordered.

MADDEN, *Judge*; and LITTLETON, *Judge*, concur.
WHITAKER, *Judge*, dissents.
JONES, *Judge*, took no part in the decision of this case.

MOLLIE NETCHER NEWBURY v. THE UNITED STATES

[No. 45597. Decided October 2, 1944]*

On the Proofs

Income tax; deduction for depreciation of trust property not allowable to beneficiary.—Where the trust established by plaintiff's deceased husband, of which trust plaintiff was the trustee and also a beneficiary, required that the property in question be held together by the trustee for the benefit of the entire estate and the respective beneficiaries; it is *held* that, under the applicable statutes and Treasury Regulations, the depreciation of such property was allowable to the trustee as a deduction on the income tax returns of the trust for the years 1935, 1936, and 1937, and plaintiff, as a beneficiary, is not entitled to recover. (Section 23 (1), Revenue Act of 1934, 48 Stat. 689.) *Commissioner* v. *Netcher*, 143 Fed. (2d) 484, cited.

*Plaintiff's petition for writ of certiorari denied January 29, 1945.

The Reporter's statement of the case:

Mr. Llewellyn A. Luce for plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark*, for defendant.

Mr. Fred K. Dyar on brief.

Plaintiff seeks to recover $45,451.34, alleged overpayment of income tax for 1935, 1936, and 1937, with interest, on the ground that she, as one of several beneficiaries of a trust created in the will of her former husband and entitled to receive one-third of the income thereof, was entitled to deduct from her income one-third of the depreciation allowable in respect of the trust property, i. e., one-third of $142,868.98 for each of the taxable years. She claims that under the terms of the trust instrument this position is in accordance with section 23 (*l*) of the Revenue Act of 1934 and 1936 and of art. 23 (*l*)–1 of Regulations 86 and 94.

Defendant takes the position that since the trust required that the property in question be held together by the trustee for the benefit of the entire estate and the beneficiaries thereof the depreciation of such property was allowable to the trustee, as was done, and as all the interested parties had consistently treated the depreciation deduction in their returns.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen and resident of Cook County, Illinois. Charles Netcher, the former husband of plaintiff, and hereinafter sometimes referred to as "the decedent," died June 19, 1904, leaving a will, a true copy of which is in evidence as joint exhibit I.

2. Charles Netcher was survived by his wife, the plaintiff herein, who has since married Mr. Saul Newbury and is now known as Mollie Netcher Newbury, and by four children, namely, Charles Netcher, Townsend Netcher, Ethel Netcher Chagnon, and Irving Netcher. The four children became beneficiaries of the trust under and by virtue of the will of Charles Netcher, deceased. Plaintiff also became a bene-

ficiary under the will and also was executrix and trustee under section third of the will. During the years 1935, 1936, and 1937, plaintiff acted as trustee and filed an income tax return on Form 1041, such return being captioned "Mollie Netcher Newbury, Trustee under the Will of Charles Netcher, Deceased." Plaintiff has acted as trustee under the will from 1904 until the present date.

3. The beneficiary, Charles Netcher, died November 4, 1931, and was survived by his wife, Gladys O. Netcher, and two children, Mollie Netcher and Francice Netcher, who are also beneficiaries under the will. Irving Netcher, Townsend Netcher, and Ethel Netcher Chagnon became twenty-five years of age on or before May 13, 1926.

4. Charles Netcher, at the time of his death, was the owner of and possessed certain real estate in Block 58, Original Town of Chicago, in the City of Chicago, State of Illinois. At the time of the death of Charles Netcher the improvements on this land consisted of certain obsolete buildings, the income of which was not sufficient to pay the carrying charges. The title to the property under the will passed to plaintiff as the trustee, and she has ever since acted as the trustee of the estate.

5. Under authority of the will the trustee, prior to 1923, borrowed money on the security of the real property and erected thereon a modern steel and tile fireproof store and office building seventeen stories high and having three basements. This building was leased to the Boston Store of Chicago, Inc., from the time of its completion, and was so leased during 1935, 1936, and 1937.

6. For 1935 the sum of charges for ground rent, interest on mortgage, taxes, and depreciation exceeded the rents from the building by $114,023.93.

For 1936 the sum of such charges exceeded the rents from the building by $137,857.36.

For 1937 the sum of the same charges exceeded the rents on the building by $102,843.53.

These deficits of $114,023.93 for 1935, $137,857.36 for 1936, and $102,843.53 for 1937 were treated as part of the expenses of the so-called principal trust under the will, hereinafter

referred to. The charges for depreciation for each of the years were reasonable allowances for losses sustained through exhaustion, wear, and tear of the building. In computing the distributable net income of the trusts created by the will, the trustee has continuously deducted from the gross income of the trust estate an allowance for loss sustained through exhaustion, wear, and tear of the improvements and has set up a reserve to cover the loss sustained through exhaustion, wear, and tear of the improvements. The balance in this reserve account at December 31, 1936 was $1,969,676.66 and at December 31, 1937 was $2,112,545.64.

7. For each of the years 1935, 1936, and 1937 the depreciation sustained on the properties of the trust estate amounted to $142,868.98. Whether this depreciation should be allowed as a deduction to the trustee acting for the trust estate or to the beneficiaries is the question involved in this suit. After deducting the amount of $142,868.98 for depreciation during each of the years 1935, 1936, and 1937, the principal trust sustained a net loss of $169,523.09 for 1935, $160,383.31 for 1936, and $133,993.24 for 1937.

8. Sections Second and Third, which are those portions of the will creating the trust in question and pertinent to the issue presented, were as follows:

> SECOND: All the rest, residue and remainder of my Estate of whatever nature and wherever situate, I give, bequeath and devise to my said wife, Mollie Netcher, in trust (in this will otherwise described as the Principal Trust Estate) for the uses and purposes following, to-wit:
>
> (a) One third of the entire net income of said Principal Trust Estate shall be paid over by said trustee, annually or oftener as to said trustee shall seem fit, and as the said income accrues, until the termination of this trust as hereinafter provided, to my said wife, Mollie Netcher, during her life and after her death until the termination of this trust to such person, persons, corporation or corporations and for such purposes as my said wife may by deed or will direct. * * *
>
> (b) The remaining two-thirds of the entire net income of said Principal Trust Estate, shall be divided by said Trustee annually or oftener as to said Trustee shall seem fit, and as said income accrues, until the termination of this trust as hereinafter provided, into equal

shares, one such share to be thereafter held in trust by said trustee as a Separate Trust Fund for each of my children, now or hereafter born to me, who is living at the time of my death or who has died before my death leaving a widow, or child or children living at the time of my death. Each such Separate Trust Fund shall be subject to the provisions, limitations and conditions hereinafter provided with respect to the same. * * *

At any time after the attainment of the age of twenty-five (25) years by any of my said children, the said Trustee may, in her discretion, pay over to any such child, in addition to the expenditures and payments hereinabove provided, the sum of Twenty-five Thousand Dollars ($25,000), or such part thereof as to said Trustee may seem fit; and at any time, from and after the attainment of the age of thirty (30) years by any of my said children, the said Trustee may, in her discretion, pay over to any such child, for the purpose of enabling such child to engage in business, or for any other purpose which said Trustee may deem for the best interests of such child, the additional sum of One Hundred Thousand Dollars ($100.000) or such part thereof as to said Trustee may seem fit. Both of said payments of Twenty-five Thousand Dollars ($25,000) and of One Hundred Thousand Dollars ($100,000) shall be made out of the Separate Trust Fund hereinabove provided for the benefit of the child to whom such payments are made, or if said Separate Trust Fund be not sufficient for said payments, then out of the principal of said Principal Trust Estate, provided it be not necessary to sell any of the real estate in Block Fifty-eight (58) of the Original Town of Chicago, in Cook County, Illinois, for the purpose of making such payments, it being my wish that said real estate in said Block Fifty-eight (58) shall be held together for the benefit of my entire Estate and the beneficiaries thereunder, subject to the power of sale or other disposition hereinafter given to the executor or executors, trustee or trustees under this Will.

In making all payments, however, hereinabove or hereinafter provided, as well as in all other expenditures for the support or benefit of my said children, or any of them, or of any of their children, it is my wish that the then existing size and income of my Estate and of their respective interests therein shall be carefully considered and that while my said children and grandchildren should be encouraged and assisted in all habits of thrift

and industry, they should not be given the means for extravagance or idleness.

* * * * *

THIRD: I do hereby appoint my said wife, Mollie Netcher, as the executrix of this my Last Will and Testament, and I request that she be not required to furnish sureties upon her bond either as Executrix or as Trustee.

* * * * *

I hereby fully authorize and empower the said Executrix or Executor and said Trustee or Trustees hereinabove provided for to sell and dispose of, either at public or private sale, any property real or personal which may be included in said Principal Trust Estate or in any of said Separate Trust Funds above described, and to invest and reinvest from time to time the income and proceeds thereof, either in real or personal property, in such manner as they may deem best; to continue the business in which I may be engaged at the time of my death, to lease, convey, exchange, re-exchange, invest, re-invest the same or the proceeds thereof, to sign, seal, acknowledge and deliver proper and valid instruments for the conveyance, transfer, exchange or other disposition of any or all of my said property, either real or personal, and of every sort and nature, to improve the same, borrowing money therefor; to encumber or pledge the same for any loan or loans; to subdivide or plat any real estate; to build or re-build thereon and generally to sell, lease, manage and control all of said Trust property and the accumulations thereof and to invest and reinvest from time to time the same and all the income and proceeds thereof either in real or personal property, and all investments and re-investments to be in the absolute discretion of such Executrix, Executor, Trustee or Trustees and without limitation as to the character thereof, with all powers in regard to said property and all investments or re-investments and the management and control thereof that I myself would have, were I then living, without obligation on the part of any vendee, grantee, lessee, obligee and encumbrancee or any other person claiming under them or their successor or successors in trust to see to the application of the purchase money or avails of any such, or other, disposition.

9. Plaintiff, as trustee, filed fiduciary income tax returns on Form 1041 for the trust estate for each of the years in question.

The returns of the trustee for 1936 and 1937 showed charges to plaintiff herein, Mollie Netcher Newbury as beneficiary, of $62.75 for 1936, and credits of $13.86 for 1936 and $63.04 for 1937. These charges and credits are correct.

10. The beneficiaries shown on the returns of the trustee were Mollie Netcher Newbury, the plaintiff herein, Gladys Netcher, Francice Netcher, Mollie Netcher, Townsend Netcher, Ethel Chagnon and Irving Netcher. The net distributable income to each beneficiary was computed on each of the returns of the trustee by subtracting from the net loss of the trust estate, plus special charges, the income from the special trusts plus the special credits shown on the returns. The result, as shown on the returns of the trustee, was an aggregate net loss to the beneficiaries of $111,853.74 for 1935, $123,653.25 for 1936, and $68,599.45 for 1937 and no distributable income to any of the beneficiaries, including the plaintiff herein, except Townsend Netcher, whose distributable income as shown on the return for 1937 amounted to $200.57. The net loss to the plaintiff herein, as shown on the trustee's returns, amounted to $55,447.31 for 1935, $60,838.74 for 1936, and $45,434.71 for 1937.

The special trusts referred to on the returns of the trustee were provided for under the will, and the income from the special trusts was shown on the returns of the trustee in connection with the computation of distributable income to all the beneficiaries of the trusts with the exception of the plaintiff herein who was a beneficiary only of the principal trust estate. No returns, Form 1041, for 1935, 1936, and 1937 were filed by Mollie Netcher Newbury as trustee under the will other than as above stated.

Plaintiff duly filed her individual income tax returns for 1935, 1936, and 1937 on or about March 15 of the succeeding years and paid the tax due thereon within the time and in the manner provided by law.

Plaintiff in her individual income tax returns for 1935, 1936, and 1937 deducted losses sustained during such years amounting to $47,623 for 1935 (amended return), $47,623 for 1936, and $45,434.71 for 1937.

11. The losses above mentioned were deducted by plaintiff on her returns for those years as representing her one-

third share of the depreciation on properties of the trust estate of the decedent for the respective years 1935, 1936, and 1937, and/or plaintiff's proportionate share of the net operating losses sustained by the trust estate during 1935, 1936, and 1937, occasioned by depreciation sustained during those years on properties of the trust estate.

12. In computing the distributable income of the trust estate for each year the Commissioner of Internal Revenue allowed to the trust estate the deduction of $142,868.98 for depreciation of the properties of the trust estate, and in computing the individual taxable net income of plaintiff for 1935, 1936, and 1937 disallowed in full the deduction taken each year by plaintiff as her share of the net operating loss of the trust estate occasioned by depreciation. In other words, the Commissioner determined that under the terms of the will creating the trust the deduction for depreciation was allowable to the trustee of the trust estate but that on their individual income tax returns the beneficiaries of the trust estate could not take a deduction for their share of the net loss on the trust estate occasioned by depreciation.

Additional income tax amounting to $12,738.79 for 1935, $12,780.36 for 1936, and $12,489.64 for 1937 was determined and assessed against the plaintiff by the Commissioner. July 5, 1940 plaintiff paid the following sums, representing the additional tax and interest thereon assessed against her: $12,733.79 for 1935, plus interest thereon of $3,257.58; $12,-780.36 for 1936, plus interest thereon of $2,502.67; $12,487.64 for 1937, plus interest thereon of $1,689.30, totaling $45,451.34.

13. November 9, 1940, plaintiff filed claims for refunds, for each of the three years mentioned, of the tax and interest paid for each year.

January 20, 1941, the Internal Revenue Agent in Charge at Chicago notified plaintiff that her claims for refund for 1935, 1936, and 1937 would be disallowed and attached to the notice a statement showing the reasons for the proposed disallowance of the claims.

March 27, 1941, the Commissioner of Internal Revenue formally rejected the claims for refund.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff is the trustee of certain trusts created by the will of her former husband, Charles Netcher, who died June 19, 1904. She is also a life beneficiary of one-third of the net income of the principal trust. The other beneficiaries were the four children of the decedent and plaintiff. By the will of Charles Netcher, the decedent, his entire estate, except for a special bequest to his widow, was left in trust to his widow, she to receive one-third of the net income of the trust for life with power by will or deed to dispose of the right to such income from her death until the termination of the trust; the remaining two-thirds of the net income to be divided into four equal portions to be held in trust for each of the four children. The trust was to continue until the death of the last survivor of decedent's widow and his four children. The trust instrument provided that until each of the children attained the age of 25 years, respectively, the trustee should use and expend so much of each separate trust fund held for each child as, in her opinion, might be necessary for the education and support of such child. On attaining the age of twenty-five years each child was to become entitled thereafter to receive one-fourth of the entire net income of the above-mentioned two-thirds of the principal trust estate. The trust instrument provided that at any time after attainment of the age of twenty-five years the trustee might, in her discretion, pay over to any child the sum of $25,000 and after attaining the age of thirty years the sum of $100,000, and, at this point, the trust instrument stated as follows:

> Both of said payments of Twenty-five Thousand Dollars ($25,000) and of One Hundred Thousand Dollars ($100,000) shall be made out of the Separate Trust Fund hereinabove provided for the benefit of the child to whom such payments are made, or if said Separate Trust Fund be not sufficient for said payments, then out of the principal of said Principal Trust Estate, provided it be not necessary to sell any of the real estate in Block Fifty-eight (58) of the Original Town of Chicago, in Cook County, Illinois, for the purpose of making such payments, it being my wish that said real estate in said Block

Fifty-eight (58) shall be held together for the benefit of my entire Estate and the beneficiaries thereunder, subject to the power of sale or other disposition hereinafter given to the executor or executors, trustee or trustees under this Will.

Plaintiff, having a one-third interest in the annual net income of the trust and a one-third remainder interest in the trust corpus, claims that as such beneficiary she is entitled to deduct from her gross income in her individual income tax returns her proportionate share (one-third, or $47,623) of the depreciation of $147,868.98 sustained by the properties of the trust in each of the years 1935, 1936, and 1937.

Defendant denied this claim of the plaintiff, which she presented in timely claims for refunds, and held that under the terms of the trust instrument the provisions of section 23 (*l*), Revenue Acts of 1934 and 1936, and art. 23 (*l*)–1, Regulations 86 and 94 (hereinafter quoted), the depreciation on the trust properties was deductible by the trustee and that such depreciation deduction had been properly taken by the trustee in the fiduciary returns, Form 1041, filed for each of the years in question (see findings 6 and 7).

The correctness of this decision of the defendant is the issue presented in this proceeding. The solution of the question turns upon the interpretation of the above quoted portion of the will and section 23 (*l*) of the Revenue Act of 1934, 48 Stat. 689, first enacted as section 23 (*k*), Revenue Act of 1928.

Section 23 (*l*) is, so far as material here, as follows:

SEC. 23. *Deductions from gross income.*

In computing net income there shall be allowed as deductions:

(*l*) *Depreciation.* A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

Treasury Regulations 86 and 94 provided as follows:

> ART. 23 (*l*)-1. *Depreciation.*— . . . In the case of property held by one person for life with remainder to another person, the deduction for depreciation shall be computed as if the life tenant were the absolute owner of the property so that he will be entitled to the deduction during his life, and thereafter the deduction, if any, will be allowed to the remainderman. In case of property held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income which is allocable to the trustees and the beneficiaries, respectively. For example, if the trust instrument provides that the income of the trust computed without regard to depreciation shall be distributed to a named beneficiary, such beneficiary will be entitled to the depreciation allowance to the exclusion of the trustee, while if the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee.

In presenting this change in the Revenue Act of 1928 the Senate Finance Committee (S. Rep. No. 960, 70th Cong., 1st sess., p. 20) submitted the following explanation:

> The House bill makes no change in existing law with respect to these deductions [depreciation and depletion]. The committee proposes to amend and clarify the law governing the manner in which the deductions shall be apportioned as between life tenant and remainderman or trustee and beneficiary. There is uncertainty and considerable hardship in these two classes of cases under the existing law.
>
> In the case of life tenant and remainderman the bill provides that the deduction for depreciation shall be computed as if the life tenant were the absolute owner of the property—that is, in accordance with the estimated useful life of the property—and shall be allowed to the life tenant each year that he holds the property. In the case of property held in trust, the allowable deduction is to be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the will, deed, or other instrument creating the trust, or, in the absence of such provisions, on the basis of the trust

income which is allocable to the trustee and the beneficiaries, respectively. For example, if the trust instrument provides that the income of the trust computed without regard to depreciation shall be distributed to a named beneficiary, such beneficiary will be entitled to the depreciation allowance to the exclusion of the trustee, while if the instrument provides that the trustee in determining the distributable income shall first make due allowance for keeping the trust corpus intact by retaining a reasonable amount of the current income for that purpose, the allowable deduction will be granted in full to the trustee. The bill contains similar provisions as to the deduction for depletion.

From all the foregoing it will be seen that in the case of trust property the depreciation deduction is to be taken by and allowed to the trustee, or the beneficiaries, according to the intention of the donor or decedent as disclosed in the provisions of the trust instrument, and if such intention is not disclosed the depreciation deduction is to be determined and allowed on the basis of the trust income allocable to the trustee and the beneficiaries.

In the case at bar we think the pertinent provision of the will hereinabove quoted rather clearly expressed the intention and desire of the decedent that a deduction for depreciation of the trust property should be taken by the trustee for the Trust Estate in determining the net income distributable to the beneficiaries, and that the finding and decision of the Commissioner of Internal Revenue to that effect were correct. In making the fiduciary returns for the years in question the trustee appears to have so interpreted the will and deducted the full allowances for depreciation in determining whether there was a net income of the trust estate distributable to the beneficiaries. The word "allocable" in section 23 (*l*) means "distributable." *Fleming* v. *Commissioner of Internal Revenue*, 121 Fed. (2d) 7.

The identical question here presented was before the Tax Court of the United States in the cases of *Netcher, et al.*, v. *Commissioner of Internal Revenue* (1942 Prentice-Hall B. T. A. Memorandum Decisions Service, par. 42590), and the Tax Court held in a memorandum opinion November 10, 1942, that inasmuch as the 1928 and later acts allowed depreciation to be taken by a life tenant as if he were the absolute owner

of the property the several life beneficiaries of the Netcher Trust were entitled to deduct the depreciation on the trust property in accordance with their respective interests. The Tax Court did not discuss the provisions of the will with reference to the depreciable property of the trust and the special statutory provisions dealing with property held in trust. On appeal, *Commissioner of Internal Revenue* v. *Francice Netcher*, 143 Fed. (2d) 484, the Circuit Court of Appeals for the Seventh Circuit in a well reasoned opinion reversed the Tax Court and held that under the statute, the regulations, and the intention of the decedent as expressed in the will, the depreciation in question was properly deducted by the trustee and was not allowable to the beneficiaries. In this opinion the Circuit Court said:

> The Board of Tax Appeals heretofore held in the case of *Newbury* v. *Commissioner*, 26 BTA 101 [which involved the years 1923 to 1925, inclusive], that the trustee was required (or the will was susceptible of that construction and the action of the parties confirmed that impression) to provide for depreciation reserve from the income of the principal trust. The Commissioner acquiesced in the decision. * * *.
>
> * * * * *
>
> The Tax Court [in *Netcher* v. *Commissioner*] held among other things that because of two changes in the 1928 Revenue Act, enacted after the Newbury decision, that decision was no longer res judicata or "the law of the case." Secondly, it seems to have held that the right to depreciation deduction was lodged entirely in the beneficiary, and, under authority of its Carol decision (Sue Carol, 30 BTA 443), the taxpayer could use the unused portion of its depreciation deduction against other, independent income.
>
> * * * In the instant situation, the statute was amended to provide for the use of the depreciation deduction in a contingency where the will specifically provides for the depreciation deduction, and also where it fails to so provide. It follows, therefore, that both the Commissioner and the courts must turn to the will to first determine whether it so provides. The statute in no way sets up criteria to determine whether a will does or does not so provide.
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> * * * * *
>
> While the quoted provision of the will is not a perfectly clear authorization that the trustee should take a

depreciation deduction, there is sound logic in the Board's original construction that such was the intent of the testator. We see no reason for changing that conclusion now. The construction of the will can not be made to turn on its belated effect on the income of a beneficiary of a subsidiary trust.

> What was under consideration in the Newbury case [26 B. T. A. 101] was an ascertainment of the testator's intention, as disclosed by his will. No subsequent statute or tax situation can affect, much less change, the intention of the long-deceased testator.
>
> * * * * *
>
> Believing and holding, as we do, that it was the testator's intention to provide for a depreciation reserve, we reach this conclusion, not because of any prior holding in the Newbury decision, but because the above-quoted language of the will, and the facts explanatory of the testator's intention, authorized the trustee to erect a building which would necessitate a large indebtedness. These facts convince us that no other construction of the deceased's will can be reconciled with his wishes, his testamentary directions, or his intentions.

After quoting from the Report of the Congressional Committees, the Court said:

> Our conclusion that trustee was required to make allowance for keeping the trust intact before making distribution to beneficiaries necessarily leads us to apply the statute in the light of the report of the committee, that the entire allowable deduction in this case is for the trustee. If the trustee takes the entire deduction, then beneficiary can take nothing.
>
> In other words, the two clauses of the last sentence of the statute must be read together. The effect of testator's will was to make the depreciation deduction a credit which belonged solely to the trustee. There can be no apportioning of a deduction when it all belongs to one party. "The pertinent provision" of the will which created the trust did, in effect, though not in exact words, provide that the depreciation deduction belonged to the trustee. That result gave it all to the trustee.

We agree with the reasoning and conclusions of the Circuit Court of Appeals.

The petition is dismissed. It is so ordered.

WHALEY, *Chief Justice*, concurs.

Concurring Opinion by Judge Madden

MADDEN, *Judge*, concurring in the result:

I agree that the plaintiff may not, as a beneficiary of the trust, take the depreciation for which she contends. I think, however, that the reason for this conclusion is not the reason given in the opinion of the court.

Section 23 (*l*) of the Revenue Act of 1934 (48 Stat. 689) says:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (*l*) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.
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> * * * * *

The opinion of the court, following the opinion of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *Netcher*, 143 F. (2d) 484, goes to considerable lengths to discover "pertinent provisions of the instrument creating the trust", which have the effect of directing or authorizing the trustee to set up a reserve for depreciation. The plaintiff urges that the will contains no "pertinent provisions", but is completely silent on the subject. As to this, I agree with the plaintiff. I think that the words in the will "it being my wish that said real estate be held together for the benefit of my entire estate and the beneficiaries thereunder", tell us nothing whatever about the wishes of the testator as to whether his widow and trustee should set up a depreciation reserve to replace, some time in the remote future, a new building which she, as trustee, built on the land after the testator's death. The purpose, apparently, of carrying the

process of construction of language to such lengths is to bring the case within the scope of that part of Section 23 (*l*) which is fairly clear and tangible.

I think that the alternative provision of the section which reads "or, in the absence of such [pertinent] provisions [of the instrument creating the trust] on the basis of the trust income allocable to each" [the income beneficiaries and the trustee] is, because of the silence of the will on the subect, the applicable provision. It seems to me to mean that when the will is silent, one must ascertain how, with regard to the depreciation question, the trust income is to be distributed, and assign the depreciation deduction accordingly. I cannot think of any other meaning for the statutory language quoted above. If it does mean what I have suggested, it is of great importance since, probably, a large proportion of trust instruments are silent on the question of setting up depreciation reserves.

If, then, the trust instrument contains no "pertinent provisions" one must look to the law relating to the duties of trustees to ascertain "the trust income allocable" to income beneficiaries and trustees. This will be the law of the state having jurisdiction of the trust. In this case that would be the law of Illinois. If the plaintiff, who here sues as beneficiary, does not have the right, as trustee, to set aside from income a reserve for depreciation of the property, and add that reserve to the corpus of the trust, she has been, for many years, violating the rights of the several other beneficiaries by diverting income which belonged to them to corpus which would ultimately go to remaindermen. So the plaintiff could hardly, and does not, suggest that the proper "basis of the trust income allocable to each" is different from the actual disposition of the income which has been made for many years by herself as trustee. See Restatement, Trusts, § 233, comments *l* and p as to the rules generally applicable in American jurisdictions.

The reports of committees of Congress, and the Regulations promulgated by the Department throw no light on the meaning of the statutory language which, I have suggested, is applicable to this case. But I can see no reason why there

should be a difference, for tax purposes, between the following two cases. First, the testator directs the trustee to take out of income and add to the corpus each year 3⅓% of the initial value of any building which is or may become a part of the trust property. Second, the testator says nothing relevant to the matter, but the law of the state having jurisdiction says that, unless the testator has expressly provided to the contrary the trustee shall take out of income and add to the corpus of the trust 3⅓% of the initial value of any building which is or may become a part of the trust property. In each case the income, before depreciation, goes the same way, and the text of the statute seems to me to say that the allowance for depreciation, for income tax purposes, should go the same way. In both cases the income beneficiary has no right to receive as income, either presently or in the future, that part of the "income before depreciation is deducted" which is directed by the will or by the law not to be distributed, but to be put in a reserve. It is none of his affair, as income for tax purposes, and that seems to be, in a somewhat vague sense, the reason why the statute denies him the right to use it as an offset against income which he has received from other sources. The trustee, as the owner of the corpus of the estate which would, but for the reserve, go down in its depreciated condition to the remainderman, represents the permanent interest in the property which is hurt by the depreciation, and should be able to set off the loss against taxable accretions to the corpus. It was not possible, in the statutory scheme, to treat the trust situation exactly like the legal life tenant and remainder situation, since in the latter case there is frequently no ascertainable person to represent the permanent interest in the property, and even if there is such a person, he has no income from it. It probably seemed fair to Congress, therefore, to give the life tenant the depreciation allowance even though the loss is, largely, not his loss, rather than to deny any depreciation allowance to anyone.

WHITAKER, *Judge*, concurs in the foregoing opinion.

JONES, *Judge*, took no part in the decision of this case.

THE MEMBERS OF THE TLINGIT NATION v. THE UNITED STATES

No. 45692

THE MEMBERS OF THE HAIDA NATION v. THE UNITED STATES

No. 45693

[Decided October 2, 1944]*

On Defendant's Motions to Dismiss

Indian claims; jurisdiction; approval of contracts with attorneys under the Special Jurisdictional Acts.—The Court of Claims is without jurisdiction where the provision in the Jurisdictional Acts requiring that the contracts between the plaintiff Indian Tribes and the attorneys be approved by the Commissioner of Indian Affairs and the Secretary of the Interior has not been complied with. (49 Stat. 388; amended 56 Stat. 323.)

Same; refusal to approve contracts.—The court has no jurisdiction to decide whether the refusal of the Commissioner of Indian Affairs and the Secretary of the Interior to agree to the proposed contracts between the plaintiff tribes and the attorneys was arbitrary and capricious.

Same; approval of contracts is discretionary under the statute.—The approval of the contracts by the commissioner and the Secretary is a discretionary and not purely a ministerial act, under the statute.

Mr. William L. Paul, Jr., and *Paul & Paul* for the plaintiffs.

Mr. Raymond T. Nagle, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

These cases come to the court on defendant's motions to dismiss on the ground that the court is without jurisdiction for the reason that certain conditions set forth in the special jurisdictional act, which the plaintiffs were to comply with

*Submitted January, 1944.

before suits were brought, were not complied with, and, therefore, the court is without jurisdiction to hear the cases.

The jurisdictional act is the same for both tribes. In both cases the allegations of the petitions are the same, raising the jurisdictional point. Therefore, we have not considered it necessary to write two opinions but are combining the cases in one decision.

Section 3, of the jurisdictional act, 49 Stat. 388, amended June 5, 1942, 56 Stat. 323, reads in part as follows:

> That the claim or claims of said Tlingit and Haida Indians of Alaska may be presented and prosecuted separately or jointly in one or more suits, by petition or petitions setting out the facts upon which they base their demands for relief and judgment or decree; * * * such petition or petitions may be verified by any attorney or attorneys employed by said Indians, under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and said contract shall be executed in behalf of said Indians by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior; verification may be upon information and belief as to the facts alleged; a true copy of the written contract or contracts by which such attorney or attorneys are employed by said Indians to represent them in such suit or suits shall be filed in said Court of Claims, as their authority by the said attorney or attorneys to so appear in said suit or suits for said Indians and to prosecute their said claim or claims in said Court of Claims.

The allegations of both petitions are the same and read as follows:

> [1] That on April 11, 1941, at Wrangell, Alaska, William L. Paul, Jr., and L. Frederick Paul, the undersigned attorneys at law, were duly appointed attorneys for the prosecution of this action of the Haida Indians of Alaska by the Tlingit & Haida Claims Committee. The delegates composing said Committee were regularly elected and qualified Indians selected by their respective communities under procedure agreed upon and approved by the Secretary of the Interior and the Commissioner

[1] Quoted from the Haida Nation's petition; except for names of tribes, the allegations are the same in the Tlingit Nation's petition.

of Indian Affairs on the one hand, and Roy Peratrovich and William L. Paul, Tlingit Indians and associated with the Haida Indians of Alaska (President and Secretary of the Alaska Native Brotherhood), on the other hand. And said delegates regularly met at Wrangell, Alaska, on April 9, 10, and 11, 1941, and as said Committee appointed said attorneys (together with Grady Lewis, who later declined employment), and discussed and agreed upon the terms of employment of said attorneys, being fully informed of the terms of the attorneys' contract proposed by the Office of Indian Affairs; and said Committee adopted by a vote of 48 to 5 a form of employment contract proposed by the Executive Committee and Convention of the Alaska Native Brotherhood and Sisterhood after modification thereof; and said Committee, by a vote of 50 to 1, regularly adopted a financial contract governing the collection of expense money, defining expenses of the suit, and providing a method of disbursement of expense money from its treasurer to said attorneys; and said Committee appointed a signatory committee of three from among their members to sign said contracts on behalf of the delegates and the Haida Indians of Alaska before the Judge of the United States District Court for the First Division of the Territory of Alaska; and said signatory committee with said attorneys has so executed and acknowledged said contracts. Said delegates further created a permanent organization to watch over and control the proceedings under the Tlingit & Haida Jurisdictional Act, having officers and delegates annually elected to meet annually. The Secretary of the Interior and the Commissioner of Indian Affairs unreasonably, arbitrarily, and capriciously failed and refused to approve said employment contract for the following reasons: 1) That said signatory committee had refused to appoint an attorney selected by the Indian Office to be chief counsel and relegate the other attorneys to position of associate counsel; 2) that control of the proceedings to be taken under said Jurisdictional Act was not exclusively under the direction of the Indian Office and the Secretary of the Interior; 3) that the Indians had created a permanent organization to watch over and control the proceedings; and 4) that the Indians had assessed themselves to pay $5 each to their treasurer for the expenses of the proceedings. Such failure and refusal to approve said contract is unreasonable, arbitrary and capricious for the reasons given and for any other reason, in that such action by the Secre-

> tary of the Interior and the Commissioner of Indian Affairs exceeds the authority conferred on them by the Constitution and laws of the United States and illegally invades the vested personal and property rights of petitioners, on the ground that the said Indians have been emancipated from the guardianship of the federal government over their right to sue and be sued in the Courts of the United States as a matter of their own choice with counsel of their own selection and management; and on the further ground that petitioners will not secure legal or equitable hearing of this cause of action unless represented by counsel of their own choice and management.

From the above it is seen that the attorneys appointed by the Indians must enter into a contract with the Indians which is approved by the Secretary of the Interior and the Commissioner of Indian Affairs. The petitions show that neither the Secretary of the Interior nor the Commissioner of Indian Affairs has consented to the contracts, but, on the contrary, both officials have refused to agree to the contracts between the Indians and the attorneys bringing these suits.

It is true that the petitions allege the actions of the Secretary of the Interior and the Commissioner of Indian Affairs are arbitrary and capricious. Admitting this to be true, the court is still without jurisdiction because it cannot enter into this phase of the cases.

The petitions must show on their face that, before filing suit in this court, the consent of the Secretary of the Interior and the Commissioner of Indian Affairs has been obtained to their contracts. The condition requiring approval of the contracts between the Indians and their attorneys on the part of these officials is a discretionary and not purely a ministerial act. If the Commissioner of Indian Affairs and the Secretary of the Interior have acted arbitrarily and capriciously, this is a matter on which the plaintiffs may bring mandamus proceedings to require the consent of these officials, if this process is the proper remedy. We are expressing no opinion on this phase. The court has no jurisdiction to issue extraordinary writs of certiorari, mandamus, quo warranto, et al. See *Arant* v. *United States*, 55 C. Cls. 327, 338.

To give this court jurisdiction and allow the attorneys for the plaintiffs to bring suit, it is necessary that the petitions show that the Secretary of the Interior and the Commissioner of Indian Affairs have consented to the contracts between the Indians and the attorneys. It was on this condition that the defendant consented to be sued.

In the instant cases no such consent is shown, and, therefore, this court has no jurisdiction. The consent of these officials is a condition precedent to the court's jurisdiction.

The motions to dismiss are granted and the petitions are dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

ESTATE OF ISAAC G. JOHNSON v. THE UNITED STATES

[No. 45784. Decided October 2, 1944]*

On the Proofs

Capital stock tax; corporation engaged in liquidation of estate property "doing business" under the applicable tax statutes and regulations.—Following the decision in *Magruder, Collector of Internal Revenue,* v. *Washington, Baltimore & Annapolis Realty Corp.,* 316 U. S. 69, it is *held* that a corporation which was organized for the purpose of liquidating the properties of an estate, and which since 1929 had acquired no new properties but otherwise has continued all the activities necessary to the handling of large and valuable real estate holdings in the way of business management, physical care and conservation, and from time to time negotiating sales and distributing the proceeds as liquidation was effected, was carrying on or "doing business" within the meaning of the applicable taxing acts, and that the Treasury Regulation provision that "doing business" includes activities of a corporation engaged in liquidation of properties taken over for that purpose is valid and was applicable to the situation presented in the instant case, and plaintiff is not entitled to recover the capital stock tax collected under section 105 of the Revenue Act of 1936, section 401 of the Revenue Act of 1936, and

*Plaintiff's petition for writ of certiorari denied March 5, 1945.

section 601 of the Revenue Act of 1938 for the fiscal years ending June 30, 1937, 1938 and 1939, respectively.

Same; decision in Johnson v. *United States, 92 C. Cls. 483, overruled.*—The decision in *Estate of Isaac G. Johnson* v. *The United States*, (No. 44018), 92 C. Cls. 483, decided February 3, 1941, involving the taxable fiscal years 1934, 1935 and 1936, is overruled by the decision in the *Magruder* case, *supra.*

The Reporter's statement of the case:

Mr. John Jay McKelvey for plaintiff.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.

Mr. Robert N. Anderson was on brief.

Plaintiff brought this suit to recover a total of $9,349.41, with interest, capital stock tax alleged to have been illegally collected for the fiscal years ending June 30, 1937, 1938, and 1939.

The question presented is whether plaintiff was "carrying on or doing business," within the meaning of the capital stock tax provisions of the applicable taxing acts and the regulations thereunder. In addition there is presented the questions of whether the suit on the 1937 refund claim is timely and whether, under a prior decision of this court in favor of plaintiff for prior years, the doctrine of *res judicata* or the principle of *stare decisis* applies.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, the Estate of Isaac G. Johnson, is a New York corporation with its principal office at Spuyten Duyvil, New York City. It was incorporated in 1904 under circumstances which will hereinafter appear.

2. Isaac G. Johnson, whose name appears in the name of plaintiff, died in 1899 at an advanced age. During his lifetime he had built up a large steel-casting foundry at Spuyten Duyvil, and at his death the foundry was being operated as a partnership in which he and his five sons were the partners.

In addition to the real estate on which the steel plant was located, Isaac G. Johnson had accumulated over a period of

nearly fifty years substantial real-estate holdings, a part of which was used for the steel business and the housing of his employees and a part was acquired by him for the purpose of dealing therein at a profit. All the real estate, including the buildings connected with the steel plant, was owned by Isaac G. Johnson in his individual capacity.

3. Isaac G. Johnson left a will under which, except for two cash bequests to a brother and sister, all of his property passed to his five children subject to a life interest of his widow, Jane E. Johnson. Jane E. Johnson and his eldest son, Elias M. Johnson, were named as executors and trustees.

Shortly after the death of Isaac G. Johnson a plan was submitted by an attorney for the estate under which the business interests of the decedent could be continued and a convenient means provided for the distribution of the estate upon its final liquidation to the various parties interested therein. Under that plan two corporations were to be organized, one to carry on the steel business and the other the real-estate business.

4. December 31, 1902, the steel business was incorporated under the name of Isaac G. Johnson & Company, which was the same name under which it had been carried on as a partnership. Upon organization the corporation acquired from the partnership the personal property, equipment, and goodwill of the steel business, giving in exchange therefor its capital stock, and, similarly, it purchased from the executors and trustees of Isaac G. Johnson's estate, the land and buildings which were connected with the steel business and which had been owned by Isaac G. Johnson, individually, by giving in exchange therefor first mortgage bonds of the corporation.

Isaac G. Johnson & Company continued in active existence until about 1923, when condemnation proceedings were started by the State of New York for the acquisition of its properties which finally resulted in such acquisition. In 1933 the only assets held by Isaac G. Johnson & Company were certain income-producing securities and these securities were taken over in 1933 by plaintiff for reasons of economy in handling the affairs of the two corporations.

5. In the early part of 1904 plaintiff was incorporated under the name of "Estate of Isaac G. Johnson," with an authorized capital stock of $10,000, consisting of 100 shares of the par value of $100 each, and acquired from the executors and trustees of Isaac G. Johnson's estate the real estate which had been held by him individually, except that which had been sold to the corporation Isaac G. Johnson & Company. The real estate so acquired consisted of approximately 20 acres, and as consideration for the transfer the capital stock of plaintiff was issued to the executors and trustees of Isaac G. Johnson's estate. The purposes of plaintiff were stated in the certificate of incorporation as follows:

> The acquiring, buying, selling, renting, exchanging, and otherwise dealing in real property, improved and unimproved; the building, construction, and alteration of houses and other structures thereon and the management and development of real property generally. The purchase and manufacture, acquiring, holding, owning, mortgaging, pledging, leasing, selling, assigning, and transferring and otherwise dealing in goods, wares, merchandise, and property of every kind and description. The acquiring, holding, owning, and dealing in stocks, bonds, debentures, notes, and other corporate and individual securities. The loaning of money secured by mortgages on real or personal property. The buying, selling, and dealing in bonds, notes, loans secured by mortgages or other liens on personal or real estate. The supervising, managing, and protecting of real and personal property and all interests in and claims affecting the same and the transacting of any or all other business which may be necessary or incidental or proper to the exercise of any or all of the aforesaid purposes of the corporation, wherever the same may be permitted by law either manufacturing or otherwise, and to the same extent as the laws of this State will permit and as fully and with all the powers that the laws of this State confer upon corporations under this Act, with full power to borrow such moneys as it may require for the purposes of its business.

Upon incorporation plaintiff proceeded to engage in the business for which it was organized and, as expressed in the

"purposes" clause of the certificate of incorporation, making purchases, sales, and otherwise carrying on business, as will more fully hereinafter appear.

6. Jane E. Johnson, widow of Isaac G. Johnson, died in November 1906, which terminated her life interest in Isaac G. Johnson's estate. Final accounting, settlement, and distribution of the assets of Isaac G. Johnson's estate were made by the surviving executor and trustee, and on November 30, 1906, the executor and trustee was finally discharged by decree of the surrogate court, thus ending the liquidation of Isaac G. Johnson's estate. At that time the stocks and bonds which had been received by the executors and trustees in the transfer of the assets of Isaac G. Johnson's estate to plaintiff and to Isaac G. Johnson & Company were distributed to the beneficiaries of the estate.

7. As heretofore shown, plaintiff acquired from Isaac G. Johnson's estate approximately 20 acres of land at the time of its incorporation in 1904, for which it issued capital stock. Thereafter plaintiff made further acquisitions as follows:

(a) At the time of Isaac G. Johnson's death the decedent held an undivided one-third interest in 15 acres of unimproved land in which his sister and his brother had a like interest. April 2, 1906, the 15 acres were acquired by plaintiff for a cash consideration and short-term notes.

(b) On various dates between 1906 and 1908 four parcels of land of approximately eight acres were acquired by plaintiff in the neighborhood of parcels previously purchased.

(c) In 1906 and 1907, as a result of a partition suit with respect to property in which Isaac G. Johnson had an interest at the time of his death and a subsequent auction sale of the other portions of the property, plaintiff acquired approximately 20 acres of unimproved land.

(d) In 1906 plaintiff made a purchase for cash or its equivalent of approximately seven acres of land.

(e) In 1907 plaintiff acquired an irregular piece of land from the New York Central Railroad Company and in 1909 acquired one-half acre from one party and two and one-half acres from another party.

(f) In 1914 plaintiff acquired a house and lot and in 1918 a small apartment house. In addition plaintiff made miscellaneous purchases from time to time to fill out existing plots owned by it.

8. Plaintiff proceeded in various ways to develop, improve, sell, and otherwise deal with the original property acquired as well as with later acquisitions. In addition to the purchases heretofore referred to, these activities included the selling, renting, exchanging of, and otherwise dealing in, real property, both improved and unimproved; the building, construction, and alteration of houses and other structures; the management and development of real property owned or controlled by it; the laying out and construction of streets, curbings, sidewalks, sewers, water and gas mains, and electric conduits, and the financing of improvements on properties owned by it. In all of its transactions plaintiff dealt in property to which it held title, and was in no sense a broker for other properties.

9. One of the means employed by plaintiff for the development and disposition of its properties was to form in 1908 a subsidiary known as the Edgehill Terraces Company, which was held, controlled, and financed by plaintiff, and its operations were under the direct charge of plaintiff. That corporation proceeded with the development of approximately 30 acres of the land theretofore owned by plaintiff. It improved the land with streets, sewers, gas and water mains, underground and electric conduits, and other types of improvements for a development of that character. It constructed houses which were offered for sale and sold and otherwise dealt in properties as a real estate concern. Its period of greatest activity was during the years 1909 to 1920. Funds for its development work were furnished by plaintiff from time to time as required to the extent of some eight hundred and thirty thousand dollars.

The Edgehill Terraces Company continued in existence until 1925, when it was dissolved and its remaining assets, including about twelve acres of the land previously acquired from plaintiff, were transferred to plaintiff, which owned its entire capital stock.

10. Shortly prior to the incorporation of the Edgehill Terraces Company plaintiff joined with three other parties in 1906 in the incorporation of a real estate development company known as "Along the Hudson Company" to develop lands purchased for that purpose in the vicinity of plaintiff's other holdings. That company acquired all of its properties from owners other than plaintiff, its total acreage amounting to approximately 26 acres. The corporation operated actively as a real estate company from its organization in 1906 until 1919, when the corporation was dissolved and the property remaining unsold was partitioned among the four interests, plaintiff taking title to the part set off to it, which consisted of about five acres.

11. At or about the time of the dissolution of the "Along the Hudson Company" in 1919, William F. Russell acquired 400 shares of the stock of plaintiff and became its managing director. Prior to that time all of plaintiff's stock had been held by the heirs of Isaac G. Johnson. At that time plaintiff's capital stock was increased from 100 shares to 10,000 shares of the par value of $100 a share. Russell continued as a stockholder until his death when his estate became a stockholder. In 1923 plaintiff changed its capital stock from 10,000 shares of a par value of $100 each to 10,000 shares of no par value.

12. By about 1925 plaintiff had practically ceased purchases of additional properties. Some sales were made during the period from 1926 to 1929, and other general real estate activities were engaged in but to a smaller extent than in prior years. By 1929 the total of approximately 95 acres which had been acquired by plaintiff in the various ways heretofore mentioned had been reduced to about 47 acres through sales by itself and the Edgehill Terraces Company.

13. November 4, 1929, plaintiff adopted the following resolution:

> Whereas it is the policy of this corporation gradually to liquidate its affairs as its property can be advantageously disposed of and distribute its assets among its stockholders, and

WHEREAS cash has now accumulated from the sale of certain properties in excess of any possible requirements in connection with the future liquidation of the corporation's affairs and of any obligations which it has, and

WHEREAS a paid-in surplus stands upon the books of the corporation, said surplus relating to matters existing prior to March 1, 1913, and it is deemed to be desirable to distribute to such extent as the cash in hand will justify, such surplus as a liquidating dividend to the stockholders of the corporation, now

BE IT RESOLVED that the sum of $150,000 out of the funds in the treasury be distributed pro rata among the holders of the stock of this corporation, being at the rate of $20 per share of stock held, as liquidating dividend No. 1 thereon, same to be paid from the paid-in surplus to the stockholders of record as of November 4, 1929, and the officers of the corporation are hereby authorized and directed to make payment to the stockholders in accordance with the terms of this resolution.

The liquidating dividend provided by the above resolution was the first liquidating dividend paid by plaintiff and no subsequent liquidating dividend was paid until November 1938, when a dividend of $5.25 a share was paid.

14. In about 1925 to 1929 plaintiff discontinued many of the activities previously engaged in and generally reduced its operation to the maintenance and management of its remaining properties and the making of such sales as it deemed advantageous. It continued in that manner to and including the year 1936, as well as for some time thereafter, maintaining an office with an accountant, two stenographers, and one or two outside ground keepers, receiving rents, making repairs, seeking legal advice, negotiating with promoters and architects, and considering and undertaking agency contracts and projects for the favorable marketing of its holdings. Substantially the same condition continued through the years 1937, 1938, and 1939.

15. In December 1935 plaintiff's directors took the following action:

The meeting was preceded by a general discussion at length of the conditions bearing on the liquidation of the corporation's real estate holdings, in which the rep-

resentatives of the several stock-holding interests participated. As a result of the exchange of ideas among those present and the discussion had, it was the consensus of opinion that a study should be made of the entire situation with a view to the corporation being in a position to liquidate its holdings in the market or through some special plan, as soon as the general conditions of the real estate market should make it practicable to do so with advantage; that in order to be in readiness to act at an opportune time, the advice and cooperation of a competent real-estate broker or agent should be arranged for.

Following the meeting referred to above, plaintiff entered into a contract with a broker in New York City by which plaintiff gave the broker a two-year period in which he was to have the exclusive right to sell or otherwise dispose of plaintiff's property as its agent, subject, however, to plaintiff's general direction and approval. During the term of the contract with the broker, a contract was entered into by plaintiff with a corporation to purchase a part of plaintiff's holdings for development and with an option for the purchase by the corporation of the other holdings of plaintiff for future development. Plaintiff had no financial interest in the development except as a seller of the unimproved property. After the contract had been executed the development corporation discovered that it could not proceed with its improvements because of lack of satisfactory sewers in that area, and the contract was cancelled by mutual consent. Following the failure to have the foregoing contract carried out because of the lack of sewers, plaintiff's officers induced the municipal authorities to proceed with the construction of sewers and thereby remove that obstacle in a future sale of the property.

16. The real-estate market was adversely affected by the depression which began in 1929 and continued unsettled until the outbreak of the war in Europe, after which there came an almost break-down of the market for this property for private use. Various developments of projects in the way of streets, parkways, and a memorial bridge were undertaken by state and municipal authorities on or near plaintiff's holdings

during the period 1929 to 1939 which influenced favorably the character of plaintiff's property and sales were made to the City for public use through condemnation and private negotiation. These sales tended to improve plaintiff's property which remained unsold. Plaintiff's aim and effort were directed towards the maintenance of a certain type of development in the area of its holdings which it considered for its best interests in the ultimate disposition thereof. Its president joined the Real Estate Board of the Bronx for the purpose of keeping in touch with real-estate movements and to have access to records. He also joined the Home Owners Association in that area to keep informed and to participate in efforts for or against zoning and other changes.

17. During the years 1937, 1938, and 1939 plaintiff's efforts to dispose of the property through brokers and directly by officers of the corporation were continued but without success so far as sales to private parties were concerned. However, during that period plaintiff sold to the City of New York approximately 335,000 square feet of its lands for which it received approximately $541,000. This reduced the acreage from 45 acres in 1937 to approximately 37 acres. These sales were made either through condemnation proceedings or by private agreement. The average price received was about $1.61 a square foot, and at that time plaintiff's average asking price for the property as a whole was about $2 a square foot, varying from 50 cents up to $3.50 a square foot. The prices at which the property was listed with brokers were subject to negotiation between the parties when an offer was received. The brokers were not given authority to sell the property without restriction as to price.

When property was rented, each lease contained a provision for its cancellation in the event of the sale of the property. In order to save taxes some of the old residences of the Johnson family and other buildings which could not be rented for enough to pay taxes were taken down during the period 1937, 1938, and 1939. The distribution of the proceeds from the sales of property except for the liquidating dividend paid in November 1938 was deferred in order that cash funds might be available for operating expenses and

expenses which might arise in connection with the sale of properties.

18. In 1912 the estimated value of the holdings of plaintiff was $727,877.27 and in 1920, $1,583,766.15. Such increase was largely attributable to purchases and other real-estate activities during that period, which was an active period of its existence. In 1929 the value of plaintiff's holdings was greater than in 1920, at least some of which increase was due to the acquisition in 1925 of the remaining assets of the Edgehill Terraces Company when it was dissolved, as heretofore shown. In 1937 the estimated value of plaintiff's holdings was $2,300,000.

19. During the years ending December 31, 1937, 1938, and 1939, plaintiff received income from the operation and sale of real estate and made expenditures in connection therewith as shown by the following comparative profit-and-loss statement which is indicative of the activities carried on:

Comparative profit and loss statement for the years ended December 31, 1937, December 31, 1938, and December 31, 1939

Income from Operation of Real Estate:	*December 31, 1937*		*December 31, 1938*		*December 31, 1939*	
Rent		$18, 338. 00		$17, 149. 50		$15, 973. 92
Cost of Operating Real Estate:						
Real Estate Taxes	$32, 532. 65		$41, 166. 16		$40, 809. 05	
Water	341. 62		184. 07		237. 31	
Repairs	788. 82		613. 44		1, 968. 36	
Fire Insurance	541. 73		498. 50		446. 58	
General Expense	3, 096. 58		3, 486. 64		3, 981. 46	
Office Expense	9, 973. 05		10, 952. 42		9, 674. 56	
Legal Expense	1, 405. 03		3, 446. 16		3, 492. 31	
Miscellaneous Expense	1, 139. 27		1, 500. 92		1, 844. 60	
Depreciation of Buildings	6, 464. 81		5, 519. 81		5, 519. 81	
Total		56, 283. 56		67, 368. 12		67, 974. 04
Net Loss from Operation of Real Estate		(37, 945. 56)		(50, 218. 62)		(52, 000. 12)
Income from Real Estate taken in Henry Hudson Parkway Widening	48, 000. 00					
Income from Real Estate taken in "N" Parcel Condemnation Proceeding			202, 346. 10			
Cost of Real Estate taken (Including Expenses)	25, 997. 93		111, 460. 41			
Net Profit from Sale of Real Estate		22, 002. 07		90, 885. 69		
		(15, 943. 49)		40, 667. 07		(52, 000. 12)

Other Income:						
Interest on Henry Hudson Bridge Award, or Other Award	5,070.66		13,770.62		----------	
Interest on Land Contracts Receivable	264.43		208.63		183.33	
Interest on Parkway Widening Proceeding	741.70		----------		----------	
Refund of Expenses advanced in Henry Hudson Bridge Proceeding	888.36		----------		----------	
Discount on Accounts Payable	----------		318.05		205.08	
Total other income	----------	6,965.15	----------	14,297.30	----------	388.41
		(8,978.34)		54,964.37		(51,611.71)
Other Deductions:						
Interest on Accounts Payable	1,746.92		466.83		----------	
Capital Stock Tax	[1] 7,047.58		3,168.03		3,128.87	
Hall Contract Expense	----------		4,268.03		----------	
Sales Promotion	----------		2,217.85		----------	
House Wrecking (Inc. Book value written off)	----------		7,550.80			
Total other deductions	----------	8,794.50	----------	17,671.54	----------	3,128.87
Profit or loss	----------	(17,772.84)	----------	37,292.83	----------	(54,740.58)

[1] For 1934-35-36.

20. In the capital stock tax returns filed by plaintiff for the fiscal years 1934, 1935, and 1936, plaintiff claimed exemption from the capital stock tax on the ground that it was in liquidation and not "doing business within the meaning of the capital stock tax act," an affidavit attached to the claim reading in part as shown in finding 17 of the Special Findings of Fact set out in *Estate of Isaac G. Johnson* v. *United States*, 92 C. Cls. 483.

After denial of the claim for exemption and the rejection of claims for refund, plaintiff instituted suit in this Court for the recovery of the taxes which had been paid for those years on the ground that it was not "doing business" within the meaning of the applicable capital stock tax act. This Court made Special Findings of Fact which included the following ultimate finding:

> From all the evidence it is found that during the period involved the plaintiff has confined its activities to the owning, holding, and preservation of its property with intent to dispose of the same and distribute its avails in liquidation, and did only the acts necessary to continue that status.

On the basis of these findings, this Court held that plaintiff was not "doing business" and accordingly rendered judgment in favor of plaintiff for the taxes paid in those years. *Estate of Isaac G. Johnson* v. *United States*, *supra*. That decision became final without an application for certiorari by either party.

21. Plaintiff filed capital stock tax returns for the fiscal years 1937, 1938, and 1939, declaring values for its capital stock for those years in the respective amounts of $3,024,-909.06, $3,000,000, and $2,984,000. Attached to each return was a claim for exemption on the ground that plaintiff was in process of liquidation and was not "doing business" within the meaning of the capital stock tax act, such claim for 1937 appearing in plaintiff's exhibit 1 which is incorporated herein by reference.

22. The return for the fiscal year ending June 30, 1937, referred to in the preceding finding, was filed July 19, 1937. April 27, 1938, the Commissioner rejected the claim for exemption on the ground that the activities of plaintiff constituted doing business within the meaning of Article 43

(a) (5) of Regulations 64 relating to the capital stock tax under Section 105 of the Revenue Act of 1935 which reads in part as follows:

> Illustrations.—(a) General.—In general "doing business" includes any activities of a corporation whether it engages in— * * *
> (5) the orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distributing the proceeds as liquidation is effected—for example, the liquidation of an estate, or of properties taken over from another corporation, or of the shareholders' fractional interests in particular property; * * *

23. Thereafter, the tax plus interest in the total amount of $3,168.03 was assessed by the Commissioner and paid by plaintiff June 1, 1938. Plaintiff filed a claim for refund of the foregoing amount on September 7, 1938, on the ground that the capital stock tax law was unconstitutional and on the further ground that since 1929 all activities carried on related to liquidation which did not constitute doing business within the meaning of the act. March 17, 1939, the Commissioner rejected that claim, and in the same communication rejected the claim for exemption for the fiscal year ending June 30, 1938.

June 26, 1941, and concurrently with the filing of claims for the fiscal years 1938 and 1939, plaintiff filed a second claim for refund for the fiscal year ending June 30, 1937, in the same amount as the prior claim in which plaintiff not only contended that it was not doing business within the meaning of the act but also assigned the following ground:

> The legal status of the corporation for the years 1937, 1938, and 1939 is exactly the same as for the years 1934, 1935, and 1936, and the court having entered judgment directing the refund of the Capital Stock taxes for 1934, 1935, and 1936, this claim for refund is based not only upon the facts but upon the legal determination that such facts do not constitute the doing of business within the terms of the law imposing a Capital Stock Tax.

December 30, 1942, the Commissioner advised plaintiff that inasmuch as the claim for refund for 1937 filed on September 7, 1938, had been rejected on March 17, 1939, the later claim for the same year could not be considered.

24. The return for the fiscal year ending June 30, 1938, was filed July 15, 1938, with a claim for exemption similar to that filed for the fiscal year ending June 30, 1937. The claim for exemption was rejected March 17, 1939, as shown in finding 23. Thereafter, the Commissioner assessed the tax and interest for that year which plaintiff paid on May 4, 1939, in the amount of $3,128.87. June 26, 1941, plaintiff filed a claim for refund for the fiscal year ending June 30, 1938, on the same ground as the second claim for refund which was filed June 30, 1937.

25. August 30, 1939, plaintiff filed a return for the fiscal year ending June 30, 1939, with a claim for exemption similar to that filed for the two preceding years. The Commissioner rejected the claim for exemption December 20, 1939. After appropriate assessment by the Commissioner of tax and interest for that year in the total amount of $3,052.51, plaintiff paid that amount February 1, 1940. June 26, 1941, plaintiff filed a claim for refund for the fiscal year ending June 30, 1939, on the same ground as the second claim for 1937 and the claim for 1938.

26. December 30, 1942, the Commissioner rejected the claims for refund for the years 1938 and 1939 on the ground that this suit, which was filed December 12, 1942, had been brought for the recovery of the capital stock tax paid for those years.

27. During the years 1937, 1938, and 1939, and for about the ten preceding years, plaintiff engaged in activities which had for their purpose the ultimate disposition of its holdings at a profit without the undertaking of new activities which would interfere with or unduly retard an early advantageous disposition. While the properties were at all times for sale, at no time did plaintiff offer them for sale at the best price which could be obtained but it gave consideration to whatever offers were received with the view of determining whether sales at the prices offered would be to its best interest. It continued to carry on with substantial taxes and operating expenses, as shown in finding 19, with the hope it might ultimately dispose of its properties on advantageous terms in an orderly liquidation.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

This is a suit to recover capital stock tax in the amount of $9,349.41, with interest, alleged to have been illegally collected under sections 105, Revenue Act of 1935, 401 of the act of 1936, and 601 of the act of 1938 for the fiscal years ending June 30, 1937, 1938, and 1939.

The primary question is whether, during the years involved, plaintiff was "carrying on or doing business," within the meaning of the capital stock tax provisions of the taxing acts mentioned.

Plaintiff contends that it was not so engaged in carrying on or doing business, and relies upon the opinion of this court to the effect in *Estate of Isaac G. Johnson* v. *The United States*, 92 C. Cls. 483, decided February 3, 1941, involving the taxable fiscal years 1934, 1935, and 1936. That was a suit by this plaintiff, and the court upon the findings made and the authorities cited in the opinion reached the conclusion that plaintiff was not engaged in carrying on or doing business within the meaning of the applicable taxing acts. In reaching this conclusion in the opinion the court did not discuss nor give effect to the existing Treasury regulations on the question of the applicability of the provisions of the taxing acts to a situation such as was disclosed by the facts. The court found as a fact that plaintiff was engaged in carrying out the purposes of its organization and that "The plaintiff, during the period involved in the case, confined its activities to the owning, holding, and preservation of its property with intent to dispose of the same and distribute its avails in liquidation, and did only the acts necessary to continue that status." The court concluded that this did not constitute the "carrying on or doing business."

We think this conclusion of the court upon the facts involved has been overruled in *Magruder, Collector of Internal Revenue*, v. *Washington, Baltimore & Annapolis Realty Corp.*, 316 U. S. 69. In that case, which is very similar to the case at bar, the court held, first, that a corporation which was organized for the purpose of liquidating the properties

of another corporation, and which, since its organization, had been carrying on negotiations for the sale of the properties, selling them from time to time as satisfactory offers were received, and renting unsold properties under short-term leases in an attempt to earn the carrying charges pending sale, was carrying on or doing business within the meaning of the taxing act; and, second, that the Treasury Regulation provision that "doing business" includes activities of a corporation engaged in liquidation of properties taken over for that purpose is valid and was applicable to the situation there presented.

After quoting from art. 43 (a) (5) of Regulations 64, the court said, at pages 72–74, as follows:

> If the regulation is both applicable and valid, respondent manifestly cannot prevail.
>
> On the question of applicability there can be no doubt, for the language of the regulation precisely describes respondent's activities. We find without substance respondent's assertions that Article 43 (b) (2) is inconsistent with Article 43 (a) (5) and that it more exactly fits the facts of this case. During the period in question, respondent did not fall into that state of quietude, covered by the specific language of Article 43 (b) (2), in which it was merely owning and holding specific property and distributing the resulting proceeds. See *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; cf. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 516–17. On the contrary, respondent was actively engaged in fulfilling the purpose of its creation, the liquidation of its holdings for the best obtaintable price.
>
> Article 43 (a) (5) is both a contemporary and a long-standing administration interpretation, having been in effect in substantially the same form since 1918, except for the period from 1926 to 1933 when the tax was not imposed. We are of opinion that it is valid, as well as applicable.
>
> The crucial words of the statute, "carrying on or doing business," are not so easy of application to varying facts that they leave no room for administrative interpretation or elucidation. To be sure, in many, if not in most, instances the factual situation will be so extreme as to leave no doubt whether a corporation is doing business or not. But the nuances of facts between the two extremes have

produced a nebulous field of confusion which has been recognized by courts striving to fit close cases into one category or the other. Interpretative regulations, such as Article 43 (a) (5), are appropriate aids toward eliminating that confusion and uncertainty. Cf. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 102; *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326.

In the case at bar it appears, as it appeared in the prior case reported in 92 C. Cls. 483, that shortly after the death of Isaac G. Johnson a plan was submitted by an attorney for the estate under which the business interests of the decedent could be continued and a convenient means provided for the distribution of the estate upon its final liquidation to the various parties interested therein (finding 3).

A definite purpose in organizing the plaintiff was the eventual distribution of Isaac G. Johnson's estate among his heirs and the convenient handling of his estate pending liquidation. Under its certificate of incorporation plaintiff had the usual powers of a real estate company which it largely exercised down to 1929, when by resolution it declared that it was its purpose to liquidate as "its property can be advantageously disposed of."

From that time to the end of the period here involved, plaintiff has acquired no new properties but otherwise has continued all the activities necessary to the handling of large and valuable real estate holdings in the way of business management, physical care, and conserving and making effort towards greater value and greater ultimate profit. It has engaged in the orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate, and distributing the proceeds as liquidation is effected. This "orderly liquidation" has been a purpose since 1904, when it was incorporated, and since 1929 has been the sole purpose of plaintiff (finding 27). Substantial operations were carried on (finding 19).

On the facts and under the decision of *Magruder* v. *Washington, Baltimore & Annapolis Realty Corp.*, *supra*, plaintiff is not entitled to recover. It is not necessary to discuss the other questions as to *res judicata*, or the timeliness of the suit

as to 1937 under the refund claim filed and rejected for that year (findings 22 and 23).

The petition is dismissed. It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

RUFE PERSFUL v. THE UNITED STATES

[No. 46086. Decided October 2, 1944]

On Defendant's Demurrer

Jurisdiction; tort.—Where negligence or other tortious conduct of defendant's officers is charged in assigning plaintiff, a Federal prisoner, to a task involving risk, and in his treatment after an accident in performing such task; it is *held* that the Court of Claims is without jurisdiction. *Indians of California* v. *United States*, 98 C. Cls. 583, 599, cited.

Mr. Rufe Persful, per se.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes up for consideration on the defendant's demurrer to the petition. The defendant maintains that the petition does not state a cause of action against the United States within the jurisdiction of the Court.

According to the petition the suit is for damages for a permanent and serious injury to plaintiff's left arm, which had its inception in an accidental amputation of four fingers. He was at the time of the accident undergoing sentence of imprisonment at Alcatraz, California, and being ordered to sharpen some stakes for the purpose of building a form for a concrete border to a flower bed and given an axe for that purpose, he unfortunately struck the fingers of the hand that was holding the stake. The incident is not attributed to lack of skill; it was purely accidental. Professional treatment was delayed, infection set in, the plaintiff prisoner was hos-

pitalized, transferred from Alcatraz California Hospital to the hospital at Leavenworth, Kansas, penitentiary, thence transferred to the United States Hospital at Springfield, Missouri, Medical Center, where he was cured of the infection but lost the major portion of his hand. Thereupon he was taken to McNeil Island, Washington, where he now is.

The case is one sounding in tort. Negligence or other tortious conduct of defendant's officers is charged in assigning plaintiff to a task involving risk, and in treatment after amputation. In the very recent case of *Indians of California* v. *United States*, 98 C. Cls. 583, 599, attention was directed to the fact that the general jurisdiction of this court did not extend to a case sounding in tort. See 145 Judicial Code, Sec. 250, Title 28, U. S. Code Annotated. This follows decisions of many years' standing.

The question as to the cause of action being barred by the statute of limitations is adverted to in the defendant's brief on demurrer, but no date is assigned in the brief as the date of accrual of the right of action. In view of the lack of jurisdiction on other grounds the question of limitations is not necessary to decide.

The demurrer is sustained and the petition dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

WILLIAM ALFRED LUCKING AND MARGARET HOLMES DAVIS v. THE UNITED STATES

[Nos. 45956 and 45957. Decided December 4, 1944]

On Defendant's Demurrer

Damages; rights of depositor in national bank in receivership.—Where the depositors in a national bank in receivership have been paid in full and have released and satisfied their claims in full, plaintiff (Lucking) as a depositor has no claim against the bank as a depositor and no right of action against the United States on account of attorneys' fees or clerk hire paid out by the receiver.

Same; suit on behalf of others by one not entitled to sue for himself.—Where one is himself not entitled to recover anything, he cannot conduct in his name a litigation for others, even if those others have rights which they as individuals or as a class might litigate.

Same; rights of shareholders in holding company which is shareholder in national bank in liquidation.—Where plaintiffs, stockholders in a bank stock holding company, accepted and held certificates of stock on each of which was printed a promise by the holder that he would be liable for his proportionate share of any statutory liability imposed on the holding company as the owner of shares in the bank; and where on the basis of this promise, and as a result of court decisions that the holders of shares in the holding company were "shareholders" in the bank within the meaning and purpose of the statute making shareholders in national banks liable to assessments, such assessments were enforced against shareholders in the holding company; it is *held* that plaintiffs were stockholders in the bank only in the sense that they came within the purpose and equity of the statute imposing liability, but plaintiffs have no right of action against the United States on account of the expenses of receivership and liquidation of the national bank.

Same; no call made upon receiver of holding company.—The one who had the primary interest in conserving the assets of the bank, if the bank receiver refused to do his duty, was the receiver of the holding company, which owned all the stock of the bank, and plaintiffs make no showing that they have called in vain upon him.

Same; no showing made that plaintiffs have right to bring suit.—It is *held* that the plaintiff, Lucking, as a former depositor in First National Bank, has no interest in the assets of that bank, because he has been paid as a depositor and has released the bank from any further liability; that both plaintiffs, as stockholders in the holding company which owned the stock of the bank, are some steps removed from the position from which litigation such as is involved in the instant suits should be conducted, and they have made no showing of the necessity for their being permitted to act in the place of those who would, normally, conduct such litigation.

The Reporter's statement of the case:

Mr. William Alfred Lucking for the plaintiffs. *Mr. Albert W. Fox* was on the briefs.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

Madden, *Judge*, delivered the opinion of the court:

The Government has demurred to the plaintiffs' petition in each of these two cases. The petitions in the two cases make substantially the same allegations, except in regard to the particular alleged violations of law for which judgment is asked. The alleged violation in case No. 45956 has to do with attorneys' fees paid to private attorneys who were employed by the receiver of a closed national bank. In case No. 45957 the alleged violation is the payment, out of the assets of the bank, of clerks employed in the Washington, D. C., office of the Comptroller of the Currency, for services rendered in connection with the affairs of the closed bank. The petitions are long. The allegations of No. 45956 will be first summarized.

The plaintiff Lucking had $7,500 on deposit in the First National Bank—Detroit, when it closed in 1933. He sues on behalf of himself and all the general depositors and creditors of the bank "as their interests may appear." Lucking, as administrator of an estate, and Davis, the other plaintiff, in her own right, owned in 1933 about 1,000 shares in Detroit Bankers Company, thereby "being and becoming stockholders" in First National. The plaintiffs sue on their own behalf and also on behalf of all others who owned shares of Detroit Bankers Company in 1933.

First National is a national bank in Detroit, Michigan. Until it closed on February 11, 1933, it was doing a general banking business. Its deposits were in excess of $398,000,000 and its issued capital stock was of the par value of $25,000,000. On May 11, 1933 the Comptroller of the Currency found the bank to be insolvent and appointed a receiver. The receivership still continues. In December 1942 the last of the bank's physical assets were sold. All unsecured depositors have been paid more than 107 cents on the dollar and have released and satisfied their claims against the bank. The receiver and the Comptroller of the Currency are "expecting and hoping and intending, if possible" to close the liquidation of this "at all times solvent National Bank," and to disburse a further fund of $4,000,000 now in the receiver's

possession, for "as plaintiffs believe, more office and legal and extraordinary 'expenses' and so-called 'costs of liquidation'—without anybody, even Congress, ever finding out who gets it and what all this $18,000,000 to $20,000,000 of 'expenses' was for;" that "among and hidden in said total of 'expenses' or 'costs of liquidation' is the expenditure by said Receiver under the direction of said Comptrollers of the Currency and of the Secretary of the Treasury, in the years 1933 to 1942, of said $3,500,000 of the assets of said closed bank, for so-called attorneys' fees and legal expenses." On August 26, 1942 the plaintiffs by letter demanded of the Comptroller full information respecting the receiver's attorneys' fees such as would enable the plaintiffs "to bring proper action for the recovery of said $3,500,000 * * *." This information was not furnished by the Comptroller.

The receivership was "wholly unnecessary"; its results have been (1) the stockholders' investment of over $300,000,-000 has been lost, (2) the new National Bank of Detroit acquired the bank's goodwill for nothing, and has made a profit of over $9,000,000 to date on its common stock acquired by the General Motors Corporation, which went illegally into the banking business, and (3) the closed bank's stockholders have paid stock assessments of over $19,000,000 to the receiver who has spent to date about that sum in running the receivership.

Neither the receiver nor the Comptroller of the Currency has ever permitted a stockholder or depositor to inspect the books and records of the closed bank, or disclosed to them the details of the liquidation expenses. The receiver and the Comptroller placed the assets of the bank, including the $3,500,000 in question, in the United States Treasury, and then disbursed that sum, over the period from 1933 to 1942 to pay attorneys' fees. The Secretary of the Treasury knew and approved of these disbursements. All three officers knew that this sum could not legally be used for that purpose. These officers have willfully disobeyed the Congress. Their acts and omissions were those of the United States.

Private attorneys were employed by the receiver of the closed bank, who paid them, in fees and expenses, for the period from 1933 to 1942 approximately $3,500,000 out of

the assets of the bank. These payments were illegal, excessive, "and made in secrecy and with studied intent to conceal and hide them." The receivership has not been closed. No accounting has ever been made to the stockholders, to Congress, or to any court.

The plaintiffs ask for (1) a judgment against the United States for $3,500,000 and any other sums used from the assets of the bank to pay for private attorneys' services in connection with the liquidation of the bank, (2) for an accounting by the United States, as trustee, to the stockholders of the bank, (3) for inspection and discovery concerning the matters set forth in the petition, and (4) for such other relief as may be equitable and justly due to the plaintiffs and other stockholders.

In case No. 45957 there are the same allegations except that the matter specifically complained of is, instead of the question of attorneys' fees, as in case No. 45956, the payment out of the closed bank's assets of $1,251,000 for salaries of employees in the Insolvent National Bank Division of the Washington, D. C., office of the Comptroller of the Currency for the period from 1933 to 1940. It is alleged that these payments were "illegal and a gross breach of trust and in direct defiance and disregard and breach of the acts of Congress in such case made and provided" and, in addition, were "excessive and overcharged against said Bank by at least $750,000." Tables of figures are given intended to show that the cost of this division was greater, in proportion to the banks closed and assets collected, in the years 1936 to 1939 than in the years 1933 to 1935. The relief sought in No. 45957 is the same as in No. 45956 except that the amount sought is $1,251,000 and any other sums from the assets of the closed bank used "for any salaries performed in the District of Columbia or at the 'seat of Government'." In both cases interest is asked.

The texts of various statutes which the plaintiffs deem pertinent are quoted in the petitions.

The principal bases for the plaintiffs' claims are that, under the controlling statutes, the United States was required to pay out of its own funds (1) all charges for the services of attorneys who rendered services to the receiver

in connection with the liquidation of the First National Bank—Detroit, and (2) all clerical expenses for services rendered in Washington, D. C., in connection with the same liquidation. There are allegations that the amounts that were paid were excessive. But the principal contention is, as we have said, that no money whatever should have been taken out of the bank's funds for these purposes. Since the bank's liabilities to depositors alone was $398,000,000 when it closed, and more than enough was realized out of the bank's assets to pay all these depositors, $19,000,000 of the amount having been realized from assessments levied upon shareholders in a holding company, and the receivership continued for some ten years, the amount of proper charges for necessary legal services was undoubtedly large. Why the public treasury should bear this expense is difficult to see. The most direct statutory provision relating to the subject is the following, which was derived from the National Bank Act of 1864:

> * * * All expenses of any receivership shall be paid out of the assets of such [national banking] association before distribution of the proceeds thereof. R. S. § 5238, 12 U. S. C. 196.

The plaintiffs point to other provisions of the statutes such as the section relating to the duties of district attorneys to conduct suits arising under the banking laws, 5 U. S. C. 330, and others.

A similar legal problem is presented in regard to payment for clerk hire in the Insolvent National Bank Division of the Washington office of the Comptroller. That the conservation of the assets of the bank in Detroit required a great deal of work in Washington is plain. That this work was for the benefit of that bank's creditors and stockholders, rather than the taxpayers generally, is also plain. Why the latter should pay for it, when the former get the benefit of it, is not plain. Again the Government points to the statute quoted above about the expenses of bank receiverships, and the plaintiffs point to certain statutory provisions forbidding the payment of clerks in Washington from sources other than the treasury, upon appropriation. See 5 U. S. C. 45, 46, and 66.

These conflicts in the statutes present interesting, and perhaps difficult, questions, which seem not to have been raised before throughout a long period of the administration of the banking laws. Since we have concluded, as will appear below, that the plaintiffs do not show by their petitions that they have rights to bring these suits, even if their views as to the interpretation of the statutes are correct, we do not decide those questions. We find it necessary to consider only one of the grounds urged by the Government in support of its demurrer, i. e., that the plaintiffs do not, in their petitions, state facts showing that they are entitled to recover, either as individuals, or as members of a class of persons having interests similar to their own.

If one is, himself, not entitled to recover anything, he cannot, of course, conduct in his name a litigation for others, even if those others have rights which they as individuals could litigate, or which one or more members of the class of those who have rights could litigate for all of them. Such a litigant is a mere intermeddler, and no possible economy, which is the reason for permitting class suits, could result from such a procedure.

The only bases upon which a right in the plaintiff Lucking can be spelled out of the petitions are that (a) he was a depositor in the First National Bank—Detroit, at the time it closed in 1933, and (b) he was in 1933 and is a stockholder in the Detroit Bankers Company, thereby being a stockholder in the First National Bank—Detroit. We now consider whether he has any rights as a depositor. The petitions say that in December 1942 the last of the physical assets of the closed First National Bank—Detroit, had been sold, and the receiver had "paid all unsecured depositors of said * * * [bank] over 107 cents on the dollar, and they have released and satisfied their claims against said Bank in full." On the basis of these statements the plaintiff has no claim against the bank as a depositor.

Both plaintiffs assert rights as stockholders in the First National Bank—Detroit, because of their ownership of shares in Detroit Bankers Company. The facts behind this legal conclusion, as disclosed in the plaintiffs' briefs and argument

are as follows: The Detroit Bankers Company was a holding company, which owned all the stock in the First National Bank—Detroit, and several other banks. When it acquired these stocks, and issued shares in itself to the former owners of the shares in the banks, it was required by the authorities in the state of Michigan to print on each certificate of its shares a promise by the holder that he would be liable for his proportionate share of any statutory liability imposed on the holding company as the owner of shares in the banks. See *Barbour* v. *Thomas*, 7 F. Supp. 271, 273. On the basis of this promise, and of the conclusion that the holders of shares in the holding company were "shareholders" in the First National Bank—Detroit, within the meaning and purpose of the statute making shareholders in national banks liable to assessment, such assessments were enforced against shareholders in the holding company. *Barbour* v. *Thomas*, C. C. A. 6, 86 F. (2d) 510, certiorari denied, 300 U. S. 670. In a case in which the shareholders in a holding company had not expressly assumed liability for assessments on national bank stock held by it, the Supreme Court has recently reached the same conclusion. *Anderson, Receiver*, v. *Abbott, Admx.*, 321 U. S. 349.

The legal conclusion, which the plaintiffs state in their petitions, that they were and are stockholders in the First National Bank—Detroit, because of their ownership of stock in the Detroit Bankers Company is erroneous. The enforcement against them of the liability of stockholders in First National, even apart from the express promise which they made when they acquired their shares in the holding company, shows only that they were "shareholders" in the bank in the sense that they came within the purpose and equity of the statute imposing liability. But for most, perhaps all, other purposes they were not shareholders in the bank at all. Certainly the holding company was the "shareholder" in the bank which was immediately and directly liable for the assessment. It was hopelessly insolvent after the failures of the banks whose stock it held, of which First National was one. *Barbour* v. *Thomas*, 7 F. Supp. 271 at 274. Yet to whatever extent the receiver of First National did not succeed in collecting from the holding company's share-

holders the assessments for which that company itself was directly liable, it remained liable. If its shareholders were really, as the plaintiffs allege in their petitions, the stockholders in First National Bank—Detroit, they would have a right to any assets of First National left over after its debts were paid. But in fact, any such assets would go to the holding company, to be used first to pay its creditors, and only after they were paid would there be anything for the stockholders. The one, therefore, who has the primary interest in conserving the assets of the First National Bank—Detroit, if the receiver of that bank refuses to do his duty, is the receiver of the Detroit Bankers Company, which owns all of the stock of First National. The plaintiffs make no showing that they have called in vain upon him.

The plaintiffs, in an appendix to their reply brief, quote some testimony taken in another litigation indicating that the certificates of the stock of First National Bank—Detroit, which was owned by Detroit Bankers Company had been deposited with the receiver of First National as custodian for the shareholders of Detroit Bankers. Even if we permit the plaintiffs' petitions to be supplemented by these bits of testimony, we have no idea as to either the purpose or the legal effect of this deposit of the stock. We cannot presume that it put the shareholders in Detroit Bankers in a position where they would have a better right than the creditors of that company, in any assets of First National which might remain after its debts were paid. Unless we do so presume, the plaintiffs' positions are not improved by the material in the appendix.

We conclude, therefore, that the plaintiff Lucking, as a former depositor in First National, has no interest in the assets of that bank because he has been paid and has released the bank from any further liability; that both plaintiffs, as stockholders in the holding company which owned the stock of First National, are some steps removed from the position from which litigation such as is involved in these petitions should be conducted, and have made no showing of the necessity for their being permitted to act in the place of those who would, normally, conduct such litigation.

We do not pass upon the other grounds relied on by the Government in support of its demurrers. The demurrers are sustained and the petitions dismissed. It is so ordered.

Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

ON MOTIONS TO FILE AMENDED PETITIONS

(Decided February 5, 1945)

Madden, *Judge*, delivered the opinion of the court.

The court having sustained the Government's demurrers to the plaintiffs' petitions in these cases, the plaintiffs have, by motions, asked leave to file the amended petitions which accompany the motions. The Government has filed objections to the plaintiffs' motions.

In sustaining the demurrers to the plaintiffs' petitions, the court held that the petitions did not show that the plaintiffs had a right to maintain suits on behalf of themselves and the other stockholders in the First National Bank-Detroit; that they were not stockholders in that bank, but were stockholders in the holding company, Detroit Bankers Company, which owned the stock of First National; that Detroit Bankers Company was insolvent and in receivership; that if claims of First National against the Government, such as were asserted in the plaintiffs' petitions, were collected, the money would go in the first instance to pay the creditors of Detroit Bankers; that the Receiver of Detroit Bankers was the person whose duty it was to enforce such claims, if they had merit, and if First National or its Receiver or Directors neglected to enforce them; that, so far as the petitions showed, the plaintiffs had not called in vain upon the Receiver of Detroit Bankers.

In the amended petitions which the plaintiffs ask leave to file, they say that after our decision of December 4, 1944, they, on December 29, 1944, filed their petition or motion in

the Circuit Court for the County of Wayne, Michigan, in the Detroit Bankers Company receivership case, and asked that court to reopen the receivership and reappoint the Receiver therein and give him authority to intervene in the two cases in this court, and, with the plaintiffs, prosecute those cases to determination; that the Circuit Court for the County of Wayne held that the reopening of the receivership was not necessary; that the plaintiffs, as class plaintiffs, were authorized and fully able and competent to represent all creditors (if any) and all stockholders of the Detroit Bankers Company and of the First National Bank-Detroit, as though the receiver was reappointed and intervened as a coplaintiff in the cases pending in this court. The plaintiffs attach to their proposed amended petitions a copy of their petition in the Circuit Court for the County of Wayne, as Exhibit A, and a copy of that court's order dismissing their petition without prejudice, as Exhibit B.

I

The amended petitions tendered with the motions are not amended petitions because they show on their face that the causes of action, if any, stated in them arose long after the filing of the original petitions, and some weeks after our decision sustaining the demurrers to the original petitions. In that decision we held, as we have said above, that the plaintiffs had no right to maintain a class or representative suit without first calling on the receiver of Detroit Bankers Company, whose duty it was to realize the assets of that company for its creditors and stockholders, to perform that duty. That the plaintiffs' omission to allege such a demand in their original petitions herein was not inadvertent is shown by their representation in paragraph IX of their petition to the Circuit Court of Wayne County, filed December 29, 1944, which is Exhibit A to their tendered amended petitions, and which says:

> Upon information that prior to December 4, 1944, this Court's Receivers herein and their counsel had no knowledge of the claims and rights set forth and put in issue

in said two Court of Claims petitions marked Exhibits A and B.[1]

It is apparent, therefore, on the face of the proposed amended petitions that the plaintiffs have no cause of action prior to December 4, 1944. Their petitions should, therefore, be tendered as original petitions, so that such questions as the applicability of the statute of limitations can be determined without confusion concerning the dates when the suits were brought.

II

In our view, the proceedings in the Circuit Court for the County of Wayne do not remedy the defect which, we found, was fatal to the plaintiffs' original petitions. If we may infer from the petition and order in that court which the plaintiffs attach to their tendered amended petitions that the plaintiffs, after our decision sustaining the demurrers, demanded of the Receiver for the Detroit Bankers Company that he bring suit to collect these potential assets, it does not appear that the Receiver refused to do so. The Government, with its objections to the pending motions, furnishes us a transcript of the discussion which occurred in the Circuit Court for the County of Wayne on the plaintiffs' petition there and before that court made its order. It appears from that transcript that the Receiver took no position at all as to whether the claims which the plaintiffs were making on behalf of the stockholders had merit. If he thought they had, one would suppose that he would have joined the plaintiffs in requesting the reopening of the receivership, so that proper steps could be taken to realize these large sums for creditors and stockholders. If he thought the claims had no merit, one would suppose he would have said so for the guidance of the court. If, as would have been natural, he had no opinion as to whether they had merit or not, since he had learned of them only a few days, if at all, before the hearing in that court, one would suppose that he would have asked for time to study the questions, rather than to turn

[1] These were the original petitions in this court, demurrers to which petitions we sustained on December 4, 1944.

over to volunteers a responsibility which was his own, i. e., the recovery of assets of the insolvent for which he was receiver. The Receiver did not, therefore, refuse to prosecute the claims.

The Circuit Court for Wayne County was asked to authorize its Receiver, not to bring suit on these claims, but to "intervene in said two above causes at bar and prosecute the same (with said plaintiffs) to final determination on the merits." It is not surprising that the Court, and, if we may so infer, the Receiver, were not willing to adopt proceedings initiated by volunteers without even informing the Receiver or the Court of them, and jointly with the volunteers, carry the proceedings forward.

It appears from the order of the Circuit Court for Wayne County that the Judge entertained views concerning the rights of stockholders to sue which are different from those expressed by this court in its decision sustaining the demurrers to the original petitions. We have reconsidered the question and have again come to the conclusion that stockholders of an insolvent corporation do not have the right to prosecute class or representative suits to recover alleged claims of the corporation without first calling on those whose duty it is to collect such claims.

Since the tendered amended petitions contain the same defects as the original ones, to which we sustained demurrers, no useful purpose would be served by permitting them to be filed.

The plaintiffs' motions are denied.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

EDWIN D. GIBB v. THE UNITED STATES

[No. 45564. Decided June 5, 1944]

On the Proofs

Pay and allowances; dependent mother.—Upon the undisputed facts, plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff was appointed a midshipman at the United States Naval Academy on June 17, 1914, and was commissioned an ensign in the United States Navy on June 30, 1917. He has served continuously on active duty as a commissioned officer in the Navy since June 30, 1917, attaining his present rank of commander on January 23, 1939, to rank from June 23, 1938. He is a bachelor officer.

2. Plaintiff's father, Edwin S. Gibb, died intestate on May 2, 1933. During his lifetime he had been engaged in the piano business in Dorchester, Massachusetts, but on account of poor health he had not worked for two or three years prior to his death. The only property left by him was an equity in a house located at 6 Mascot Street, Dorchester, Massachusetts, assessed at $2,900, upon which there was a mortgage of $1,650, and his savings, which, after the payment of medical and burial expenses, amounted to $52.

3. Plaintiff's mother, Mrs. Alice M. Gibb, continued to reside in the house at 6 Mascot Street, after the death of her husband, until her death on January 13, 1943, at the age of eighty. She was in ill health, partially blind, and confined to her home for several years prior to her death, including the period of this claim.

Her only daughter, Mrs. Jessie Gomez, lived with her until her death in July 1939, and while living she probably pro-

vided the chief support of the mother, although she was given some assistance from the plaintiff during that period.

The three rooms on the upper floor of the house have been rented to a Mrs. Fleming for the last eighteen years. Mrs. Fleming originally occupied the upper floor with her husband, but she and her young son have occupied it since her husband's death. Mrs. Fleming originally paid plaintiff's mother $28 a month for the upper floor, but after the death of Mr. Fleming the rent was reduced to about $20 a month. About February 1940 the rent was again reduced to $15 a month, in return for Mrs. Fleming taking care of the furnace and helping plaintiff's mother in other ways.

4. The granddaughter of plaintiff's mother lived with the latter prior to the former's marriage in 1938, and she and her husband lived there for a short time after their marriage. They then moved to their own home but separated shortly thereafter, and about July 1940 the granddaughter returned to live with plaintiff's mother and has lived with her since that time.

5. In November 1939 plaintiff's mother "quit-claimed" her right, title, and interest in the Mascot Street house to the plaintiff, who was then her only living child and sole heir. No consideration was given for this transfer of the property, and the only reason it was transferred was in order to simplify the settlement of the mother's affairs in the event of her death, she then being seventy-six years of age, infirm, and partially blind.

Since August 1, 1939, plaintiff's mother has owned no other real or income-producing personal property.

6. Plaintiff has paid the interest on the mortgage and the taxes on the Mascot Street property since about 1929, expending a total of $1,185 in interest during that period and around $100 a year for the taxes. He has also paid for the coal used in heating the house for many years. In addition, since August 1, 1939, he has contributed $10 each week to his mother.

During the period of this claim plaintiff's contributions, with the $15 received from the tenant, gave the mother an income of about $58 a month, which she used to defray the living expenses of herself and her granddaughter. Their

average joint monthly living expenses included the following items: food, $28–32; gas, $4; electricity, $2 or $3; water, $1; and laundry, $2.50. The mother also required some medical attention, for which she paid the doctor $3 a visit; and she paid the son of her tenant 50 cents a week during the winter months, to clean off snow and carry out ashes. During the period of this claim she was unable to leave her home and bought few if any clothes for herself but did buy some clothes for her granddaughter, who received no other compensation for caring for her.

7. Plaintiff made claim for increased rental and subsistence allowances on account of a dependent mother, which claim was disallowed by the General Accounting Office.

8. Plaintiff's mother was dependent on him for her chief support during the period August 1, 1939, to September 30, 1942.

The difference between the rental and subsistence allowances of an officer of plaintiff's rank and length of service with a dependent and the amount received by plaintiff as an officer of his rank and length of service without a dependent totals $5,388.80, for the period from August 1, 1939, to September 30, 1942, according to a report from the General Accounting Office.

Plaintiff's claim continues to January 13, 1943, the date of his mother's death.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case are not in dispute and show conclusively that plaintiff's mother was dependent upon him for her chief support. Entry of judgment will be suspended awaiting receipt of a report from the General Accounting Office showing the amount due. It is so ordered.

In accordance with the above opinion, and upon report from the General Accounting Office showing the amount due thereunder to be $5,947.80, and upon plaintiff's motion for judgment, it was ordered December 4, 1944, that judgment for the plaintiff be entered in the sum of $5,947.80.

EDWIN DOUGHERTY AND M. H. OGDEN, TRADING AS OGDEN & DOUGHERTY v. THE UNITED STATES

[No. 45856. Decided October 2, 1944. Plaintiff's motion for new trial overruled December 4, 1944]

On the Proofs

Government contract; error in bid not disclosed before award of contract.—Where plaintiffs, contractors, in the submission of their bid for the construction of an Army hospital, made an error in their estimates of cost, which was not called to the attention of the contracting officer until after their bid was accepted; and where the contract was executed without correction of the error; it is *held* that plaintiffs are not entitled to recover.

Same.—Equity will not relieve from a unilateral mistake.

Same; Rappoli and Moffett, Hodgkins cases distinguished.—The decisions in *Edmund J. Rappoli Co., Inc.,* v. *United States*, 98 C. Cls. 499, and *Moffett, Hodgkins, etc., Co.* v. *Rochester*, 178 U. S. 373, in which the bidders called attention to errors before the awards were made, are distinguished.

The Reporter's statement of the case:

Mr. O. R. McGuire for the plaintiff.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. John B. Miller* was on the brief.

The court made special findings of fact as follows, upon a stipulation of facts entered into between the parties:

1. The plaintiffs, Edwin Dougherty and M. H. Ogden, at all times hereinafter mentioned were a partnership, trading under the name of Ogden & Dougherty, with their principal place of business at 348 Third Street, Portsmouth, Ohio, and were engaged in the construction business.

2. Under date of November 25, 1940, Major Don L. Hutchins of the United States Army Air Corps at Wright Field, Dayton, Ohio, issued invitation No. QM 6159-41-15, Specification No. 2585-E, for bids to be received until 11:00 A. M., Eastern Standard Time, on December 27, 1940, and then be publicly opened, for the construction of a hospital building

at Patterson Field, Ohio, which is near Wright Field. Later the date for receipt of bids was extended to January 7, 1941, at which time 13 bids were publicly opened, said bids being as follows:

Mutual Construction Co	$189,000.00
Ogden & Dougherty	210,661.00
James I. Barnes	229,000.00
Knowlton Construction Co	235,000.00
Wheeler Engineering Co., Inc	240,490.00
L. M. Leonard Co	241,235.00
George Sollitt Const. Co	245,994.00
William R. Goss Co	247,000.00
William S. Miller Co	248,700.00
F. K. Vaughn Building Co	248,770.00
Hagerman Construction Co	248,985.00
Frank Burke & Son	257,000.00
Simpson Construction Co	264,000.00

3. Plaintiff Dougherty was present at the time and place of opening of the bids and heard the amounts of the respective bids announced. He was skeptical as to the correctness of his bid until he heard announced the amount of the lower bid submitted by the Mutual Construction Company. He returned to his home at Portsmouth and upon checking over his estimates discovered the errors hereinafter referred to. However, since there was a lower bid than his, he assumed that an award would not be made to his company and hence did not then make known to the Government officers at Wright Field that such errors existed.

4. The bid submitted by Mutual Construction Company was later found to be unacceptable and it was rejected. On January 15, 1941, Mr. J. N. Muschler, Procurement Officer in the office of the United States District Engineer at Cincinnati, Ohio, as a representative of the District Engineer, telephoned to Edwin Dougherty and stated to him that the low bid submitted by Mutual Construction Company had been rejected by the District Engineer, Major Fred T. Bass, and that the next lowest bid submitted by Ogden & Dougherty had been accepted for the construction of the hospital at Patterson Field. Mr. Muschler advised Mr. Dougherty that he was coming to Portsmouth the next day with formal notice of award and all necessary contract documents, for the pur-

pose of having the contract executed. Dougherty thereupon advised Mr. Muschler that he had discovered an error in the bid submitted by Ogden & Dougherty and asked that consideration be given its correction before he should come to Portsmouth.

Mr. Muschler thereupon advised Mr. Dougherty that in his opinion the District Engineer lacked authority to change the bid; that the exigencies of the service would not admit of the necessary delay incident to presenting the matter to higher authority for decision; that an award having already been made, he would bring the contract documents to Portsmouth the following day, as planned, for execution; and that the alleged error would have to be presented by plaintiffs as a claim upon completion of the work.

5. The verbal notice of the error in bid given in the telephone conversation of January 15, 1941, with Mr. Muschler was confirmed by telegram dated January 16, 1941, from Ogden & Dougherty to the District Engineer, as follows:

> Regards Hospital Patterson Field we have found an error over $16000 in our bid. Please consider before coming to Portsmouth.

The District Engineer replied in telegram of the same date as follows:

> You are hereby notified that your bid dated January Seven Nineteen Forty One in the sum of Two Hundred Ten Thousand Eight Hundred Forty Nine Dollars covering construction and completion of one Hospital including the Utilities thereto and including alternates E F I K and N at Patterson Field Ohio covered by Invitation Number Q M Six One Five Nine Dash Four One Dash One Five specification Number Twenty Five Eighty Five Dash E is accepted Contract and Bonds will be transmitted to you today by Mister J. N. Muschler of this Office for execution. Reference your telegram of this alleging an error in the aforementioned bid the exigency of the service is such as will not admit of the delay incident to forwarding your allegation to higher authority for decision. Therefore it is directed that you proceed with the execution of the contract and bonds in question. Upon completion of the contract work, claim for the amount alleged due may be submitted to this office which will forward it to proper authorities for

consideration. Should you refuse or fail to execute contract and bonds within ten days after prescribed forms are presented for signature, you will be considered a defaulting bidder in which event contract for the work will be negotiated by this office in the open market and excess costs if any charged to you and your surety.

6. Mr. Muschler, with the contract documents, arrived at the office of Ogden & Dougherty on the afternoon of January 16, 1941, and personally presented said contract documents to them for execution, together with a formal letter of award which had been prepared and signed the preceding day in Cincinnati by the District Engineer, prior to Mr. Muschler's telephone conversation with Mr. Dougherty, which letter was dated January 15, 1941, and was as follows:

> Your bid dated January 7, 1941, in the amount of $210,849.00, submitted in response to Invitation No. QM 6159–41–15, which was opened in the U. S. Engineer Field Officer, Wright Field, Dayton, Ohio, on January 7, 1941, for the construction and completion of a hospital at Patterson Field, Ohio, is hereby accepted. You are hereby notified that the Government shall not be fully obligated in this transaction until you have furnished acceptable performance and payment bonds and the formal contract papers are fully executed and you have received written notice to proceed with the work.
>
> There are enclosed for your execution four copies of Contract No. W203eng–1444, dated January 15, 1941. All copies of the contract should be signed by one of the members of your firm, and his signature witnessed by two competent persons.
>
> There are enclosed four copies of performance and payment bond forms, which must be executed in accordance with the enclosed instructions. The penal sum of each bond must be $105,424.50. It is requested that, if required, a current power of attorney be furnished for the person executing each bond for the surety company. Any erasures on the contract or bonds must be carefully noted over the signature of all persons concerned. In connection with the bond forms, the surety should be advised that the rate and total amount of premium charged for each bond must be inserted in the place provided therefor on page 2 of the form. In the event that the consideration for the payment bond is included in the performance bond premium and no separate premium is charged for said payment bond, a statement to this effect

must be made in the proper place on the payment bond form.

Please return all copies of the contract and bonds to this office at the earliest practicable date.

Plaintiffs refused to sign the contract at that time and requested a conference with Major Fred T. Bass, the District Engineer, regarding the alleged errors. Such a conference was arranged for the next day, January 17, 1941, in the office of the District Engineer in Cincinnati, at which time plaintiffs Ogden and Dougherty appeared and conferred with the District Engineer and his assistants.

At such conference, plaintiffs exhibited the work sheets prepared by them in connection with their bid estimate, which disclosed that although an allowance for Workman's Compensation and Social Security Insurance was estimated at the reasonable rate of 10 percent of total labor costs of $26,824.50, the charge for such insurance was extended on said work sheets at $268.24, being only one percent of said amount, instead of $2,682.45, resulting in a reduction of $2,414.21 in the total amount of said bid. Said work sheets also showed that a lump sum of $35,690.00 was estimated by plaintiffs as the cost to them of certain items of work covered by the contract, viz, ventilation and air conditioning, refrigeration, plumbing, gas fitting, heating, and electrical work, said estimate being based on the bid of one W. F. Schmidt who had, on January 5, 1941, submitted the following proposal to plaintiffs as a subcontractor:

I hereby agree to furnish all necessary labor and material to install the plumbing (P–1 to P–28 Inc.), Heating (H–1 to H–10 Inc.), Ventilating and Air Conditioning (V–1 to V–13 Inc.), Refrigeration (R–1 to R–6 Inc.), Gas Fitting (GF–1 to GF–2 Inc.) as called for in the plans and specifications for the Hospital at Patterson Field, Ohio, prepared by the Construction Division of the War Department, for the sum of *Thirty-five Thousand Six Hundred Ninety Dollars* ($35,690.00).

If Refrigeration is furnished and installed by others, Deduct, *Thirteen Hundred Eighty-six Dollars* ($1,386.00).

The above proposition includes electric wiring, and any excavation required to install the above work.

We wish you success in securing this contract, and

trust that if you are, we may be given the opportunity of working with you.

Electrical work required for the Hospital at Patterson Field, Ohio, was covered in the specifications in paragraphs E–1 to E–42, pages E–1 to E–14, inclusive. Although neither electrical work nor the above symbol-numbers were embodied in the Schmidt proposal, as were the other items on which said bid was submitted, plaintiffs contended at such conference that they were misled by the sentence in said sub-bid reading as follows: "The above proposition includes electric wiring and any excavation required to install the above work," and interpreted said bid to include all electrical work called for in Specification Items E–1 to E–42, pages E–1 to E–14, inclusive, above mentioned. The District Engineer, Major Bass, who was also the contracting officer, recognized at that time that there was some factual basis for plaintiffs' claim of an error in their bid, but reiterated that a change in the contract price could not be made by him and the matter would have to be presented as a claim at the completion of the contract work.

7. Plaintiffs thereupon took all formal documents relating to the contract with them to Portsmouth, and returned them, duly executed, by letter to Major Bass dated January 24, 1941, as follows:

> You will find enclosed the signed contracts, performance bond and payment bonds for the above mentioned project. We shall appreciate any effort or recommendation which you make in our behalf to secure proper credit for the factual errors made in our original bid on this work.
>
> We were greatly encouraged by our conversation with you on Friday, January 17, 1941, in our decision to begin work and attempt to complete this project in a workmanlike manner.
>
> Mr. Dougherty and myself trust that you will notify us as to the proper time and procedure to follow in making our claim for this additional amount.

The copy of said contract, bearing date of January 15, 1941, attached to plaintiffs' petition, is a true copy of the contract.

8. Formal written notice to proceed with the work was

given by the District Engineer and acknowledged by the contractors on January 27, 1941.

9. On January 27, 1941, plaintiffs wrote the following letter to the District Engineer:

> Reference is herein made to Contract No. W203eng1444 upon which we were successful bidders in the sum of $210,849.00.
>
> As previously discussed in your office, our low bid of $210,849.00 was the result of two errors amounting to $16,384.21. The first of these errors is represented in the computation of insurance, wherein we had included as insurance premium the amount $268.24 and the correct amount should have been $2,682.45. The second error resulted from the figures which our firm had received for electrical and plumbing work. This instance we interpreted the bid of W. F. Schmidt, Dayton, Ohio, in the amount of $35,690.00 as including all electrical wiring and plumbing for the building. It was subsequently determined that their bid included only the electrical wiring that pertained to the plumbing installation. As a result of our misinterpretation of their bid there now appears to be a difference of approximately $13,970.00.
>
> Anticipating your acceptance of our bid, subject to an adjustment of the above difference, we shall genuinely appreciate, for the benefit of our files and those of our bank, that you acknowledge these differences and are prepared to recommend their adjustment at the proper time.
>
> Thanking you in anticipation of this courtesy, we are.

On February 8, 1941, the District Engineer replied as follows:

> In reply to your letter of January 27, 1941, regarding errors in your estimate for the Post Hospital at Patterson Field, I am very glad to give my opinion in the matter. I have examined your original detailed estimate for this contract personally and with members of my staff and we are satisfied that errors were actually made as stated in your letter, i. e., in relation to computation of insurance premiums and in relation to the electrical work which was not included in the proposal of the Schmidt Co. of Dayton as you had estimated in your bid. The amount of the error in insurance premium is definitely $2,414.21 as shown in your estimate, whereas the second error in cost of utilities can only be determined later by comparison of your total estimate

of $35,690.00 with your final subcontracts for ventilation, refrigeration, plumbing, gas, heating and electrical work.

While it will be my purpose to report my findings as outlined above in substantiation of your claim for the error, I can of course give you no assurance as to the result as it is beyond the jurisdiction of this office.

I am informed that this information is desired by your bank and am glad to advise that there is no objection to such use.

Hoping the above gives the complete information.

10. Plaintiffs performed the electrical work, Items E–1 to E–42, inclusive, pages E–1 to E–14 inclusive, of the specifications, through a subcontract of January 18, 1941, with Klinger Electric Company at a cost of $13,000.00, the plumbing, heating, ventilating and air conditioning, refrigeration and gas fitting being performed by other subcontractors.

11. Plaintiffs completed all of the work under their contract, and it was accepted by the Government on June 15, 1942.

12. On February 28, 1942, plaintiffs made formal claim on the War Department for an adjustment in their contract price to cover the aforesaid alleged errors in their bid.

On April 6, 1942, the then District Engineer, Lt. Col. Henry F. Hannis, forwarded said claim to the Division Engineer with the recommendation that adjustment on both of the aforesaid items of alleged error be made. The Division Engineer, Colonel C. L. Hall, by 1st endorsement dated April 22, 1942, forwarded said claim to the Chief of Engineers recommending that an adjustment be made and that the plaintiffs be allowed $2,414.21 for the item of insurance and $13,000 be allowed for the item of electrical work.

By second endorsement dated June 3, 1943, the Chief of Engineers forwarded said claim to the General Accounting Office with his concurrence in the recommendation of the Division Engineer.

The Division Engineer also recommended that there be allowed the additional sum of $231.21, representing additional bond premium of 1½ percent based on the assumption that the total contract price would be increased $15,414.21, which recommendation was concurred in by the Chief of

Engineers. These recommendations were made before completion of the contract work, but the contract price was not increased and no expense for additional performance bond premium was incurred by plaintiffs, and the obligation on such bond has been discharged.

13. The claim was disallowed by the General Accounting Office by a settlement dated October 20, 1942. Upon appeal to the Comptroller General, he affirmed the disallowance in a decision of January 21, 1943.

14. Final payment of the balance of said contract price was made on February 23, 1943.

15. The amount of the mathematical error in computation of the Workman's Compensation and Social Security premiums is $2,414.21, and the cost of electrical work was $13,000.00.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs are a partnership in the construction business. They sue to recover the sum of $17,099.91. They were the successful bidders on a contract for the erection of an Army hospital at Patterson Field, Ohio. They made mistakes in figuring their bid and they sue to recover the amount of the mistakes. It is admitted that there were mistakes and that the amount of them is $15,414.21.

Dougherty, one of the partners, was present when the bids were opened. The low bid was $189,000.00; plaintiffs' bid was $210,661.00. The next low bid was $229,000.00. The others, of which there were ten, ranged from $235,000.00 to $264,000.00.

Upon returning to his home Dougherty checked the figures of his firm and discovered two errors in them as follows: (1) they intended to figure Workman's Compensation Insurance and Social Security Insurance at 10 percent of the labor costs of $26,824.50, but, through inadvertence, they extended the amount at $268.24, instead of at $2,682.45; (2) they requested from a subcontractor a bid on the ventilation, air-conditioning, refrigeration, plumbing, gas fitting, heating

and electrical work, and they supposed that the bid submitted by one Schmidt, which they used in figuring their bid, included all these items, but it was discovered it did not include the electrical work. It is agreed the cost thereof was $13,000.00.

Upon discovery of these errors plaintiffs did not communicate with the contracting officer, as they should have done. They did not do so because theirs was not the low bid and they supposed the contract would not be awarded to them. The low bid, however, was unacceptable and was rejected, and plaintiffs, being the next low bidders, were awarded the contract.

Plaintiffs were first notified that their bid had been accepted by a phone message from a representative of the contracting officer, who wished to make an appointment with plaintiffs for the next day for the purpose of executing the formal contract. Then for the first time plaintiffs advised the defendant of the mistake made by them, and requested that consideration be given to adding the amount to their bid. The contracting officer, however, advised them he had no authority to make the correction and that "the exigency of the service" would not admit of the delay necessary to submit the matter to higher authority. He, therefore, demanded the execution of the contract, but stated that plaintiffs might make a claim for the additional amount upon completion of the contract, which he promised to forward "to proper authorities for consideration."

The following day plaintiffs were presented with the formal letter of award, which had been written before the telephone call by the contracting officer's representative, and demand was made for the execution of the contract. Plaintiffs at first refused to do so, but finally did so on January 24, 1941, with the understanding that the contracting officer was aware that a mistake had been made and that he would so report, but that he could give no assurance of the result because this was beyond his jurisdiction.

On conclusion of the work the plaintiffs did present a claim. Its payment was recommended by the District Engineer, who was the contracting officer, by the Division Engineer, and by the Chief of Engineers, but payment was denied by the Comptroller General.

There can be no doubt that upon acceptance of their bid plaintiffs became obligated to do the work for the amount bid. When the contracting officer accepted the bid he was unaware that any mistake had been made. Plaintiffs had failed to notify him of it. Nor was there anything to put him on notice that a mistake probably had been made. Plaintiffs do not claim that there was. We have, then, a unilateral mistake, from which, of course, equity will not relieve. The first illustration given under section 503 of the Restatement of the Law of Contracts reads:

> A, in answer to an advertisement of B for bids for the construction of a building according to stated specifications, sends B a bid of $50,000. B accepts the bid. A, in the calculations that he makes prior to submitting his bid, fails to take into account an item of construction that will cost $5,000. If B knows or, because of the amount of the bid or otherwise, has reason to know that A is acting under a mistake, the contract is voidable by A; otherwise not.

In the case of *Edmund J. Rappoli Co., Inc.*, v. *United States*, 98 C. Cls. 499, upon which plaintiffs rely, the accepted bid was about one-third of the next lowest bid, and the plaintiff in that case also notified defendant's representative of the mistake before its bid was accepted.

In *Moffett, Hodgkins, etc., Co.* v. *Rochester*, 178 U. S. 373, also relied on by plaintiffs, the bidder called attention to the error before an award had been made and asked permission to withdraw its bid.

These cases are not in point here.

We assume the department authorized to make the contract had the right to correct the error, although it was not under a legal obligation to do so; but, instead of doing this, it recommended to a different department that it make the correction. That department refused to do so. Since it was under no legal obligation to do so, plaintiffs are not entitled to redress in this court for its refusal to do so.

Plaintiffs' petition will be dismissed. It is so ordered.

MADDEN, *Judge*; and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissents.

JONES, *Judge*, took no part in the decision of this case.

Syllabus

JOHN J. GORMAN v. THE UNITED STATES

[No. 45822. Decided June 5, 1944]

On the Proofs

Reemployment within meaning of the Civil Service Retirement Acts; misunderstanding as to deductions from salary.—Where plaintiff, a former employee of the Government and entitled to an annuity under Civil Service Retirement Acts upon reaching the age of 55 years on April 16, 1930, was offered an appointment on September 24, 1926, as mate on a Government boat, and began work at a salary which he understood to be $2,600 a year net without being informed that specific monthly and annual deductions would be made from the basic salary of $2,600 for quarters and subsistence; and where plaintiff was ignorant of the statutes and regulations governing such deductions; and where, upon being informed that such deductions would be made, plaintiff refused to accept the appointment, which had not been legally approved or confirmed by proper authority; it is *held* that there was no "reemployment" of plaintiff in the Government service within the meaning of section 7 of the Civil Service Retirement Acts so as to deprive plaintiff of the annuity to which he otherwise became entitled upon reaching the age of 55 years, and plaintiff is entitled to recover.

Same; no valid appointment where there was no meeting of minds.—Where there was no meeting of minds on the terms and conditions of the contract of employment and no acceptance of the position for the compensation offered; there was no valid employment.

Same; mutual misunderstanding.—A mutual misunderstanding as to an essential element of a supposed agreement, whether it be an employment agreement or other formal contract, vitiates the agreement. *Utley* v. *Donaldson*, 94 U. S. 29, 47, cited.

Same; payment for services rendered.—Payment for the value of service rendered, under a misapprehension as to the terms of employment, does not affect the question as to the nature of the employment arrangement or agreement. See Title 31, section 665, U. S. Code; *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159.

Same; Government employment not complete without proper approval or confirmation.—Employment by the Government within the meaning of the Civil Service Retirement Acts is not complete and final until there is approval or confirmation by competent authority in accordance with the law.

Same.—The reemployment contemplated by the Civil Service Retirement Acts in force since September 22, 1922, is a valid and completed reemployment by proper authority, fully understood and accepted by both parties concerned, and not, as in the instant case, a mere rendition of some service by a former employee, eligible to receive an annuity or receiving it, where there was no such complete understanding.

The Reporter's statement of the case:

Mr. Eliot C. Lovett for plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff sues to recover an annuity at the rate of $281.28 per annum from April 16, 1930, to June 30, 1930, and $337.56 per annum thereafter as provided under certain circumstances by the Civil Service Retirement Acts of May 22, 1920 (41 Stat. 616), July 3, 1926 (44 Stat. 904) and May 29, 1930 (46 Stat. 468). He made claim for the annuity and it was denied by the Civil Service Commission on the ground that he had lost his right thereto because he was reemployed by the Government in a position affected by the retirement provisions of the acts mentioned. The Government makes the same defense to the claim made in this suit.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen of the United States, a resident of Brooklyn, New York. He was born on April 16, 1875.

2. On June 10, 1904, plaintiff entered the service of the United States Government as a marine quartermaster in the Bureau of Immigration, Department of Labor. He continued to serve in that capacity until May 16, 1910, when he received the rating and was designated to act as a pilot, in which position he served continuously until February 28, 1922, when he was involuntarily separated from the service, without prejudice, due to a reduction in the force and not for cause on charges of misconduct or delinquency.

3. Plaintiff was continuously employed in the civil service of the Government for 17 years, 8 months, and 21 days. When he was involuntarily separated from the service, as

aforesaid, he had reached the age of 46 years, 10 months, and 15 days. His last rate of pay was $2,400 per annum.

4. Effective August 1, 1920, retirement deductions were made from plaintiff's salary at the rate of 2½ per centum per annum, as provided by Section 8 of the Civil Service Retirement Act of May 22, 1920 (41 Stat. 614), which deductions totaled $93.69 at the time of his involuntary separation on February 28, 1922. Subsequent to his separation, the $93.69 so deducted, plus $2.94 accrued interest, was, upon plaintiff's application, refunded to him on February 1, 1929.

5. On September 24, 1926, plaintiff received from Captain K. M. Bennett, U. S. Navy, the Supervisor of New York Harbor, an "Inquiry of Eligible Regarding Certification" (Form 1992) advising that plaintiff had been "certified [by the Civil Service District] for probational appointment to the position of Mate at a salary of $175 per month." He refused to accept appointment under this inquiry at $175 a month, but he did verbally accept a verbal offer by Captain Bennett of an appointment to a position as Mate at a salary of $2,600 a year. He was not advised at any time prior to October 1 that deductions were to be made for subsistence and quarters. No such deductions were made from his salary of $2,400 per annum during his previous period of Government service for the reason that the statute providing for such deduction was not enacted until March 2, 1936. When, on September 24, 1926, plaintiff notified Supervisor Bennett that he would not accept the position tendered at $175 a month, and verbally accepted Supervisor Bennett's verbal offer of an appointment as Mate at $2,600 a year ($216.66 a month), plaintiff did not know that this salary of $2,600 would be reduced to $2,100 a year ($175 a month) by monthly deductions for quarters and subsistence under section 3 of an act of March 3, 1926, and War Department Regulations issued August 6, 1926, but Supervisor Bennett did know, when he made the offer of $2,600, and when he wrote plaintiff the letter of September 29, quoted below, that these deductions would be made therefrom.

On September 29 the verbal offer above-mentioned was confirmed by the following communication addressed to plaintiff by Captain Bennett:

1. Your name appearing on the eligible list of Mates furnished this office by the Civil Service Commission, you are hereby appointed to perform the duties as Mate under this office at $216.66 per month, entering upon your duties October 1, 1926.

2. You will therefore report to the Master of the *Cerberus* for duty as Mate on board that vessel.

3. This appointment is probationary only and does not become permanent until after six months satisfactory service. It is also subject to passing the required physical examination.

The appointment by Supervisor Bennett was not final until approved by the Chief of Engineers and the Secretary of War. The appointment was not confirmed until October 14, as hereinafter set forth in finding 8.

6. On Friday morning, October 1, 1926, plaintiff boarded the boat to which he had been assigned and assumed the duties of Mate. After the boat had been at sea for about two hours the Captain of the boat handed plaintiff a letter stating, in effect, that approximately $500 would be deducted from his annual salary of $2,600 for food and lodging. Plaintiff indicated surprise and disagreement and stated to the captain, also, that he would not have boarded the ship had he received the letter prior to leaving shore. Plaintiff requested that he be put ashore at Sandy Hook Dock. The Captain refused to do that and plaintiff was compelled to remain aboard for 48 hours and perform the duties of Mate. This action of plaintiff was treated by the Government appointing officer as a resignation as of October 4, 1926. Plaintiff left the boat when it reached port Sunday morning, October 3, 1926 and did not return thereto. Plaintiff did not resign either orally or in writing.

7. Plaintiff was paid for four days, less a retirement deduction at the rate of 3½%, amounting to $1.01, which sum was, upon his application, refunded to him on June 13, 1930.

8. Authority for the employment of plaintiff as Mate, to be effective October 1, 1926, had been requested by the Supervisor of New York Harbor under date of October 2, 1926, which request was received in the Office of the Chief of Engineers in Washington on October 4, 1926. On October 7, 1926, the Chief of Engineers requested the Secretary of

War to confirm plaintiff's probationary appointment. This was done by letter dated October 14, 1926, confirming plaintiff's probationary appointment at $2,600 per annum. This was forwarded to him by the Supervisor of New York Harbor with a letter of transmittal dated October 23, 1926, stating:

> I enclose herewith confirmation of your appointment for probational period of six months as Mate under this office. This confirmation of appointment however, is voided by your resignation of October 4, 1926.

9. On June 18, 1936, plaintiff filed with the United States Civil Service Commission "an Application for Annuity" on account of services performed in the service of the United States for the period from June 10, 1904, to February 28, 1922.

10. On July 22, 1936, plaintiff's application for an annuity was rejected by the Civil Service Commission, the endorsement on the rejection reading as follows:

> Approved for rejection for the reason that while at the date of separation, February 28, 1922, the claimant had attained the age of 47 years and became entitled to a potential annuity upon attaining the age of 55, his subsequent employment in a position, within the provisions of the retirement law and resignation from such position on October 4, 1926, bars title to any annuity under the Act of September 22, 1922, and subsequent acts of July 3, 1926, and May 29, 1930.

11. Plaintiff was formally advised of the rejection of his application. On May 15, 1942, upon request for reconsideration, the Civil Service Commission reaffirmed its previous rejection. Plaintiff has taken all available administrative steps, and the Commission's reaffirmation of May 15, 1942, constituted final administrative action.

12. The material portions of Sections 1 and 3 of the Retirement Act approved September 22, 1922 (42 Stat. 1047) are as follows:

> That any employee fifty-five years of age or over to whom the Act of May 22, 1920, applies, who shall have served for a total period of not less than fifteen years and who, before reaching the retirement age as fixed in Section 1 of said Act shall become involuntarily sepa-

> rated from the service, unless removed for cause on charges of misconduct or delinquency preferred against him, shall be granted an annuity certificate in the manner provided in Section 7 of said Act which will entitle said employee, upon reaching retirement age, to an annuity as provided in Section 2 thereof equal to the annuity he would have received upon such separation from the service had he been of full retirement age: * * *
>
> SEC. 3. That in case such former employee be reemployed by the Government in a position affected by the provisions of the Act of May 22, 1920, the annuity certificate issued under the provisions of this Act shall be canceled and all rights and benefits under this Act shall terminate from and after the date of such reemployment.

13. The material portions of Section 7 of the Act approved July 3, 1926 (44 Stat. 904) and Section 7 of the Act approved May 29, 1930 (46 Stat. 468), are as follows:

> Any employee who has served for a period of not less than fifteen years, and who is forty-five years of age, or over, and less than fifty-five years, and who becomes separated from the service under the conditions set forth in this section shall be entitled to a deferred annuity, but such employee may, upon reaching the age of fifty-five years, elect to receive an immediate annuity as provided in Paragraph (b) of this section.
>
> Should an annuitant under the provisions of this section be reemployed in a position included in the provisions of this Act, or in any other position in the Government service, the annuity shall cease, and all rights and benefits under the provisions of this section shall terminate from and after the date of such employment.

14. If plaintiff did not lose any of his rights under the Retirement Acts he will be entitled to receive (upon returning for deposit in the civil service retirement fund the sum of $101.27), annuities at the rate of $281.28 per annum from April 16 to June 30, 1930, and at the rate of $337.56 per annum from July 1, 1930. He has tendered to the Civil Service Commission the said sum of $101.27 but has been advised that it is not the practice to require the deposit of a refund until title to an annuity has been established, and as that has not yet been done in this case any payment by the plaintiff will now be refused. Plaintiff is ready, willing and able to make such refund.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The controlling question in this case is whether plaintiff was reemployed in the Government service within the meaning of section 7 of the Civil Service Retirement Acts of July 3, 1926 (44 Stat. 904), and May 29, 1930 (46 Stat. 468), quoted in finding 13. The act of September 22, 1922 (finding 12), was superseded by the two subsequent acts. If plaintiff was not so reemployed in September 1926 he is entitled under the express terms of the applicable statutes to the annuity claimed, since he had more than fifteen years' service prior to being involuntarily separated from the service without prejudice due to a reduction in force (finding 2).

At the time of his separation from the service on February 28, 1922 plaintiff was receiving a salary of $2,400 per annum as a pilot. He had then reached the age of 46 years 10 months and 15 days. He became 55 years of age on April 16, 1930. During the period of his service prior to February 28, 1922 no deductions had been made from his salary for quarters and subsistence although they were furnished him. Provision for such deductions was first made by section 3 of the Act of March 2, 1926 (44 Stat. 136, 161), as follows:

> The head of an executive department or independent establishment, where, in his judgment, conditions of employment require it, may continue to furnish civilians employed in the field service with quarters, heat, light, household equipment, subsistence and laundry service; and appropriations for the fiscal year 1927 of the character heretofore used for such purpose are hereby made available therefor: *Provided*, That the reasonable value of such allowances shall be determined and considered as part of the compensation in fixing the salary rate of such civilians.

Regulations of the War Department applicable to the position involved in this case were first issued August 6, 1926, and amended, effective October 1, 1926, on September 24, 1926. Captain K. M. Bennett, the Supervisor of the New York Harbor, was fully advised of this statute and the regulations thereunder prior to and at the time he orally offered plaintiff the position of Mate on September 24, 1926, and when he

confirmed that offer in writing on September 29. The Government admits that plaintiff was not advised at any time before going on the boat *Cerberus* that deductions would be made from his salary, which he had been advised by Bennett would be $2,600 per annum, for quarters and subsistence, although the Master of the boat had a letter for delivery to plaintiff at the time he went aboard stating that such deductions would be made. The letter was delivered after the boat was at sea. The Government further admits that at all times prior to the time when this letter was handed to plaintiff, he was ignorant of the enactment of section 3 of the act of March 2, 1926, and that he had no knowledge of the departmental regulations theretofore promulgated making provision for specified monthly and annual deductions from basic salaries for quarters and subsistence under the provisions of that act.

From these facts it is clear that Captain Bennett withheld from plaintiff on September 24 and 29, important facts as to what his actual net salary would be, which facts were known to Bennett and unknown to plaintiff, and which plaintiff was entitled to know. Although it is not necessary to the decision, we cannot escape the conclusion that the Supervisor knowingly and purposely withheld this information from plaintiff when he offered him a salary of $2,600 on September 24 and when he confirmed this offer in the letter of appointment on September 29, after it had been verbally accepted by plaintiff under a misunderstanding on his part. If it be assumed that Captain Bennett was not aware of plaintiff's ignorance of the Act of March 2 and of the regulations, there was still no complete reemployment agreement. If such was the case there was a mutual misunderstanding and this had the effect of vitiating the supposed agreement.

The proof conclusively shows that plaintiff believed the $2,600 salary would be paid without any deductions and that he would not have accepted the position offered him had he known or been advised that his salary of $2,600 would be reduced by deductions for quarters and subsistence while on board the boat. Plaintiff notified the Supervisor, upon the receipt of the inquiry, that he would not accept the position of Mate at $175 a month, $2,100 a year, and he did this

also under the belief that the salary offered included quarters and subsistence, as had previously been the case during the period when plaintiff received a salary of $200 a month, $2,400 a year, as Pilot. The net salary which plaintiff would have received, under the regulations, out of the $2,600 a year would have been $2,300 a year or $191.66 a month after deduction of $300 a year or $25 a month as provided in the regulations.

In these circumstances it seems obvious that there was no meeting of minds on the terms and conditions of the contract of employment or the appointment by the Supervisor to the position in question. There was never an acceptance by plaintiff of the position in question for the compensation offered. Plaintiff rejected the original offer and the Supervisor's appointment the moment he became advised of the true terms and conditions thereof. This occurred on October 1, 1926, before the Supervisor had requested authority, as he was required to do, to make the appointment. Plaintiff did not resign and in the circumstances it was not necessary that he should.

A mutual misunderstanding as to an essential element of a supposed agreement, whether it be an employment agreement or other formal contract, vitiates the agreement. In *Utley* v. *Donaldson*, 94 U. S. 29, 47, the court said:

> There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting. It is indispensable to the modification of a contract already made as it was to making it originally. Where there is a misunderstanding as to anything material, the requisite mutuality as to assent as to such thing is wanting; consequently the supposed contract does not exist, and neither party is bound. In the view of the law in such case, there has been only a negotiation, resulting in a failure to agree. What has occurred is as if it were not, and the rights of the parties are to be determined accordingly.

See, also, to the same effect, *Allen* v. *Hammond*, 11 Pet. 63; *National Bank* v. *Hall*, 101 U. S. 43, 49, 50; *Restatement of the Law of Contracts*, Section 501, Comment (b) and Section 71 (a) and (b).

In *Turner & Otis* v. *Webster* 24 Kan. 38 (36 Am. Rep. 251) the defendants, Turner and Otis, had caused the sheriff to attach a mill and had authorized him to employ a watchman. Pursuant to this authorization, the sheriff had contacted plaintiff, Webster, who consented to act as watchman for compensation which Webster understood to be $3 a day, but which the sheriff understood to be $1.50 a day. The facts with reference to the misunderstanding appear in the opinion of the court as follows:

> The misunderstanding seems to have arisen in this way. After the attachment Turner & Otis requested the sheriff to find someone to guard the mill. Meeting Webster he asked him what he would undertake the job for. He replied, one dollar and a half a day, and nights the same. The sheriff understood him to say and mean one dollar and a half for each day of twenty-four hours, while plaintiff meant that amount for a day of twelve hours, and the same for the night time, or three dollars for every twenty-four hours. The sheriff reported the offer to Turner & Otis as he understood it, and they, after some hesitation, told him to accept the offer and employ Webster. Without further words as to the price the sheriff gave the key to the mill to Webster, and told him to go ahead. * * *

Webster brought suit to recover the reasonable value of his service on *quantum meruit*, contending that there was a mistake as to the compensation and therefore no express contract as to that. The court, in agreeing with this contention, said at p. 40:

> It will not be questioned, that, where the minds of two contracting parties do not come together upon the matter of price or compensation, but do upon all other matters of the contract, and the contract is thereupon performed, the law awards a reasonable price or compensation. * * * Here, Webster never assented to a contract to work for $1.50 a day. He agreed to do a certain work, and did it, but his understanding was that he was to receive $3 per day. Turner & Otis employed him to do that work, and knew that he did it; but their understanding was, that they were to pay but $1.50 a day. In other words, the minds of the parties met upon everything but the compensation. As to that, there was no *aggregatio*

> *mentium*. What, then, should result? Should he receive nothing because there was no mutual assent to the compensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. The law, discarding both, says a reasonable compensation must be paid. * * *

In the case at bar Supervisor Bennett, acting for the Government, after being advised that plaintiff had rejected the appointment and had left the boat under the circumstances mentioned, paid plaintiff for four days, October 1 to October 4, 1926, the last day being a Sunday, but the fact of such payment does not affect the question here. Plaintiff would have left the boat immediately upon being advised of the terms of the appointment as to compensation, if he could have done so, or if he had been advised of such terms when he reported to the Master, he would not have gone on board the boat. It does not appear that plaintiff demanded payment for the four days under the supposed employment agreement or the Supervisor's appointment of September 29. Whatever plaintiff was entitled to was due for the value of the service rendered and not under a complete and valid agreement or appointment. See Section 3679 Revised Statutes, U. S. C. Title 31, Sec. 665; *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159.

In addition to what has already been said, it is important here, we think, to note that plaintiff was not actually reemployed by the Government within the meaning of the Civil Service Retirement Acts until such authority therefor was granted by the Chief of Engineers, U. S. Army, and the Secretary of War, and such authority was not requested by Supervisor Bennett until October 2 and was given October 14, 1926. The appointment given by Captain Bennett orally on September 24 and in writing on September 29, was not final until approved and confirmed by the Chief of Engineers and the Secretary of War. Before this was done plaintiff had rejected the position offered as well as the Supervisor's appointment. There was, therefore, no valid employment agreement or appointment to approve or confirm.

We are of opinion that the reemployment referred to and contemplated by the Civil Service Retirement Acts in force since September 22, 1922, is a valid and completed reemployment by proper authority fully understood and accepted by both parties concerned, and not a mere rendition of some service by a former employee who is receiving an annuity or who is eligible to receive it, under a mutual misunderstanding, or other circumstances such as prevailed here. Plaintiff was not so reemployed.

He is therefore entitled to recover the annuity provided by the Retirement Acts of May 22, 1920, July 3, 1926, and May 29, 1930, for a former employee of his age (55 years) with more than 15 years of service, from April 16, 1930. There is no provisions in these acts as to the time within which application for such annuity must be made. Plaintiff made such application which was denied on the sole ground that he had been reemployed effective October 1, 1926.

Judgment will be entered in favor of plaintiff upon the filing by the parties of a statement or stipulation showing the amount due from April 16, 1930, to date of judgment. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge*, and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the above opinion and upon a report from the Civil Service Commission showing the amount due thereunder, it was ordered November 6, 1944, that judgment be entered for the plaintiff in the sum of $4,870.71.

HAROLD D. GREENWALD v. THE UNITED STATES

[No. 45511. Decided November 6, 1944]

On the Proofs

Income tax; overpayment of tax due to mistake of fact.—Where there was an overpayment of income taxes because of a mistake of fact; and where timely claims for refund were filed; plaintiff is entitled to recover.

Same.—Where a taxpayer pays income tax upon income which he physically receives but which he is not allowed to keep, the Government's retention of the tax would be essentially unjust; and where, as in the instant case, due to ignorance of fact, the taxpayer had no choice in the matter, the injustice would be complete. *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417, 424, distinguished.

Same.—In the instant case the reason for the "claim of right" doctrine is not present.

Same.—Even if plaintiff was negligent in not discovering accountant's falsification of records which resulted in overpayment to plaintiff of bonus by corporation of which plaintiff was an official, such negligence should not forfeit plaintiff's right to a refund of taxes paid on income which he had not earned and did not keep.

The Reporter's statement of the case:

Mr. Temple W. Seay for the plaintiff. *Mr. Phil D. Morelock* and *Messrs. Weil, Gotshal & Manges* were on the briefs.

Mr. H. S. Fessenden, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon a stipulation of the parties:

1. Plaintiff at all times mentioned herein was, and still is, a citizen of the United States. He resides at 299 Park Avenue, New York City, New York. During the years 1934, 1935, and 1936, he was vice president and treasurer of Interstate Hosiery Mills, Inc., and owned 4,500, 1,700, and 1,800 shares of the 96,991 shares issued and outstanding stock on December 31, 1934, 1935, and 1936, respectively.

2. On March 16, 1935, plaintiff filed with the Collector of Internal Revenue for the Third District of New York, at New York City, his income-tax return for the year 1934, showing a tax due thereon of $6,277.42, which was duly paid by plaintiff in quarterly installments during the year 1935. Additional taxes of $42 plus $2.60 interest thereon, a total of $44.60, were subsequently assessed for that year and were paid on April 22, 1936.

3. On March 16, 1936, plaintiff filed with the Collector of Internal Revenue for the Third District of New York, at New York City, his income-tax return for the year 1935, showing a tax due thereon of $3,482.65, which was duly paid by plaintiff in quarterly installments during the year 1936. Additional taxes of $288.51 plus $10.57 interest thereon, a total of $299.08 were subsequently assessed for that year and were paid on November 27, 1936.

4. On March 9, 1937, plaintiff filed with the Collector of Internal Revenue for the Third District of New York, at New York City, his income-tax return for the year 1936, showing a tax due thereon of $7,120.86, which was duly paid by plaintiff in quarterly installments during the year 1937. Additional taxes of $311.21 plus $19.90 interest thereon, a total of $331.11, were subsequently assessed for that year and were paid on April 23, 1938. Further additional taxes of $232.54 plus $63.20 interest thereon, a total of $295.74, were later assessed and were paid on October 10, 1941.

5. Plaintiff keeps his books and records and files his income-tax returns on the basis of actual cash receipts and disbursements, and his returns for the years 1934, 1935, and 1936 were filed on that basis.

6. March 4, 1938, plaintiff filed with the Collector of Internal Revenue for the Third District of New York, at New York City, a claim for refund of $1 or more of the income taxes paid for the year 1934. On July 11, 1938, plaintiff filed with the Collector of Internal Revenue for the Third District of New York, at New York City, claims for refund of $1,656.51 of the income taxes paid for the year 1935 and of $6,304.27 of the income taxes paid for the year 1936.

7. By letter dated October 7, 1938, the Commissioner of Internal Revenue notified plaintiff, in accordance with the

provisions of Section 1103 (a) of the Revenue Act of 1932, as amended by Section 807 of the Revenue Act of 1936, of the disallowance of his claim for refund for the year 1934. Plaintiff protested the action of the Commissioner of Internal Revenue in a communication dated October 17, 1938. The Deputy Commissioner of Internal Revenue, under date of October 21, 1938, acknowledged receipt of plaintiff's application for reconsideration of his claim for refund and stated that careful consideration would be given to plaintiff's communication and that plaintiff would be advised at the earliest practical date of the action taken. No further notification has been received by plaintiff from the Commissioner of Internal Revenue with respect to his claim for refund covering income taxes for the year 1934.

In a communication dated June 21, 1941, the Commissioner of Internal Revenue notified plaintiff, in accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code, of the disallowance in full of his claim for refund for the year 1935. No final action has as yet been taken by the Commissioner of Internal Revenue with respect to the claim for refund filed by plaintiff for the year 1936.

8. July 6, 1931, plaintiff entered into a contract of employment with the Interstate Hosiery Mills, Inc., a corporation organized under the laws of the State of Delaware and having its principal place of business at 232 Madison Avenue, New York, N. Y., and its plant at Lansdale, Pennsylvania. Under the terms of that contract of employment plaintiff was employed by that corporation for a period of six years commencing February 15, 1932, and it was provided that he was to receive compensation for his services as follows:

> Greenwald shall receive a salary at the rate of Twenty-five Thousand ($25,000) Dollars per year, payable in weekly installments of Four Hundred Eighty and 77/100 ($480.77) Dollars on the last day of each and every week during the term of this agreement. In addition, he shall receive five-thirteenths (5/13) of ten (10%) percent of such portion of the annual net profits of Interstate, before deduction of State and Federal taxes, as exceeds the sum of One Hundred Fifty Thousand ($150,000) Dollars.

By an agreement dated January 29, 1936, the terms of the former contract of employment were modified and provision

was made that plaintiff should be employed by the Company for a period of 10 years, commencing January 1, 1936, and that, in addition to a stipulated salary, he should receive:

> Seven percent (7%) of the net profits (before deduction of Federal and other income and profits taxes, but after deduction of any other taxes) of the Company in excess of Two Hundred Thousand Dollars ($200,000) per annum, as such net profits shall be determined.

9. From the time of its organization in May 1929, Interstate Hosiery Mills, Inc., had regularly employed the same firm of certified public accountants in connection with the audit of its books and records and the compilation of data for various periodic balance sheets, statements, and reports respecting its financial progress and position, including the preparation of the certified semiannual and annual reports to stockholders. Condensed stockholder reports and financial information filed with the Securities and Exchange Commission were based on these certified reports.

Interstate's common stock was registered on the New York Curb Exchange, a national securities exchange, on October 1, 1934. It was traded in on that exchange until trading was suspended on February 15, 1938.

The firm of certified public accountants had in its employ a senior supervising accountant who had progressed to that position during the years following his employment in 1928. A crew of auditors worked under his direction. On February 2, 1938, Lawrence Greenwald, the secretary of Interstate, with his office at the plant at Lansdale, Pennsylvania, accidentally discovered two forgeries against the corporation's bank account, committed in December 1937, by this supervising accountant. The discovery of these forgeries caused an investigation which revealed two other forgeries by the accountant, as well as his extensive alterations, falsifications, and distortions of Interstate's accounts, records, statements, and reports during the years 1934, 1935, 1936, and 1937. Among other things, the profits of the corporation were greatly exaggerated in the reports and statements prepared by the accountant mentioned. A public hearing was held by the Securities and Exchange Commission because of the discovery of his manipulations, and inasmuch as Interstate's

financial statements were on file with the Commission. The findings and opinion of the Commission in the matter are reported in *Matter of Interstate Hosiery Mills, Inc.*, (1939), 4 Sec. Dec. & Rep. 706. The corporation addressed a letter to its stockholders dated February 14, 1938, advising them of the discovery of the accountant's falsifications. A later report to the stockholders concerning the same matter was made by the corporation on May 24, 1938.

10. Upon the basis of the aforesaid falsified, exaggerated, and overstated reports for 1934, 1935, and 1936 the company, as provided in its agreement with plaintiff (finding 8 hereof), computed bonuses and paid to plaintiff the following amounts, as such bonuses, in the years stated:

1934	$13, 780. 83
1935	8, 120. 01
1936	33, 359. 52

Plaintiff, believing that the amounts paid represented bonuses computed on true net profits, as provided in his contract, accepted such amounts.

11. Plaintiff duly included in his gross income for the years 1934, 1935, and 1936 the bonuses received as set forth above and paid tax thereon. The amounts by which such bonus receipts exceeded the amounts subsequently determined to be due plaintiff were as follows:

1934	$13, 780. 83
1935	7, 521. 04
1936	28, 504. 83

The above stated amounts were included in the total bonus deduction by Interstate Hosiery Mills, Inc., in the original returns filed for the years 1934, 1935, and 1936. Upon discovery that the amounts deducted were excessive, the taxable income of the corporation was adjusted accordingly by the Commissioner of Internal Revenue.

In 1938 plaintiff repaid to the corporation $40,336.50 of the total $49,806.70 and on February 12, 1942, filed a protective claim for refund of 1938 taxes based upon that repayment. In 1939 plaintiff repaid to the corporation $9,470.20, the balance of said $49,806.70, and on February 12, 1942, filed a protective claim for refund of 1939 taxes based upon

that repayment. Those refund claims for 1938 and 1939 are now pending.

12. Plaintiff contends that the amounts purporting to be bonuses which he received during the years 1934, 1935, and 1936 and which were subsequently repaid to the Interstate Hosiery Mills, Inc., during the years 1938 and 1939, under the circumstances above described, should not be included in his gross income for the respective years in which paid, or for any other year. The defendant, on the other hand, contends that the amounts in controversy were paid to plaintiff and received by him, as bonuses then properly due him, without restriction as to their use or disposition, and are therefore includible in gross income in the income-tax returns filed by plaintiff.

13. If the amounts by which the total bonus receipts exceeded the bonuses subsequently determined to be due plaintiff should not have been included in gross income, plaintiff's income taxes were overpaid as follows:

Year	Amount of principal	Amount of interest
1934	$3,432.73	$2.60
1935	1,419.51	10.57
1936	5,777.31	83.10
Total	10,629.55	96.27

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff was employed by a corporation under a contract which provided that, in addition to a fixed salary, he should receive a percentage of the amount by which the profits of the corporation exceeded a stated sum. The corporation had, from the time of its organization in 1929, employed the same firm of certified public accountants to audit its accounts and inform it of its financial position. The supervising accountant who directed the audits of the corporation's books during the years 1934, 1935, and 1936 caused false audits to be made which showed that the corporation had made profits greatly in excess of its actual profits for those years. The corporation paid the plaintiff bonuses computed upon the

basis of these exaggerated profits, and the plaintiff paid the Government income taxes for those years upon the bonuses so received, as well as upon his other income.

In 1938 the corporation discovered the falsifications of the auditor, and the plaintiff in that year and in 1939 repaid to the corporation the amount of the overpayments to him. In 1942 the plaintiff filed, apparently timely, protective claims for refund of taxes paid by him in 1938 and 1939, on the ground that these payments were deductible business losses. These protective claims were intended to preserve his rights in case he should not succeed in recovering the taxes paid in 1934, 1935, and 1936, on the exaggerated bonuses, as to which he had filed claims for refund in 1938. Refunds were not made in response to his claims filed in 1938 for the years 1934, 1935, and 1936, hence this suit.

The corporation deducted the bonuses paid the plaintiff for the years in question as business expenses when it made its returns for taxes for those years. When the falsifications were discovered, the Commissioner of Internal Revenue adjusted the taxable income of the corporation for those years by disallowing the deductions.

The Government contends that, as to the alleged overpayment for 1934, this suit was not commenced within two years after the plaintiff's claim was rejected and hence is barred by Section 3226 of the Revised Statutes. The plaintiff at the argument conceded the validity of this defense, hence we do not further consider the 1934 situation.

We go now to the merits of the claims for 1935 and 1936, as to which claims for refund were filed in time and this suit was commenced in time. The Government relies principally on the doctrine stated in *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417, 424, as follows:

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

This doctrine has been applied in many cases. The plaintiff urges that it is not applicable here, because his receipt of the

bonuses was due to a mistake of fact, he and the corporation both believing that the corporation had made profits which, under his contract of employment, entitled him to the bonuses paid him. He points out that, upon the discovery of the true facts, he did not contest his obligation to refund the overpayments to the corporation and urges that the real reason for the "claim of right" doctrine is not present in his case. We agree with the plaintiff.

If one receives income he should pay taxes on it. If, due to mistake, he is aware of no reason why he is not entitled to keep it, he will pay taxes on it, as the plaintiff did in this case. If he is aware, or is made aware before he pays his taxes, that his right to keep it is questioned, he should not, in effect, ask the Government to become a party to the contest by waiting for its taxes until the contest is resolved, which may be a long time. The orderly management of the revenues might be disturbed if such a postponement were tolerated, and certainly there is no statutory warrant for postponing payment of taxes for such a reason. A conditional claim for refund, filed within the time set by the statute but stating that a refund would be desired if certain litigation should result unfavorably to the taxpayer, would not be a claim which the Commissioner of Internal Revenue could act upon before the litigation was terminated and would hardly be a proper claim.

Where, however, one pays income taxes upon income which he physically receives, but which he is not allowed to keep, the Government's retention of the tax is essentially unjust. In a case such as the instant one, where, due to ignorance of fact, the taxpayer had no choice in the matter, that injustice is complete. Even in the case of questioned income, if the taxpayer honestly believes that he has a right to the income, it is unjust to require him, in effect, to give up the income in order to keep himself free from liability to the Government for a tax on it, even though it should turn out that he must pay the whole amount back to its source and he does so within the permitted period for filing claims for refunds of taxes. Perhaps the embezzler or the usurer, who knows or should know of his liability to pay back what he has received, deserves no better than he gets under the "claim of

right" doctrine, but even as to him the Government should hardly want to keep the share of his unlawful income which has been paid to it as taxes, if all of it is needed to make whole his victims.

We conclude, therefore, that the "claim of right" doctrine does not apply to the plaintiff's situation. He overpaid his taxes because of a mistake of fact. He filed timely claims for refund. We do not think that the allowance of claims such as this, promptly made as this one was, will have any noticeable adverse effect upon the Government's revenue.

The Government asks us to find, as the Securities and Exchange Commission found in a case relating to the delisting of the shares of the corporation which employed the plaintiff, that the plaintiff, as an officer of the corporation, was negligent in not discovering the accountant's falsifications. The Government presents no evidence except the Commission's decision. We need not determine whether that evidence would be sufficient to support such a finding, since we think that, if the plaintiff was negligent, that negligence should not increase his liability for income taxes, or forfeit his right to a refund of taxes paid on income which he had not earned and did not keep.

The plaintiff may recover $7,290.49, with interest according to law. It is so ordered.

WHITAKER, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

DOMINION SMELTING & REFINING CORPORATION OF NEW JERSEY v. THE UNITED STATES

No. 46055

SEABOARD STORAGE CORPORATION v. THE UNITED STATES

No. 46069

[Decided November 6, 1944]

On Defendant's Pleas of a Prior Suit and Pleas to the Jurisdiction

Jurisdiction; taking of property under condemnation proceedings.—Under the Act of August 1, 1888 (25 Stat. 357) jurisdiction to determine just compensation for taking of property by the Government for public use under condemnation proceedings is vested exclusively in the United States District Court in which the condemnation proceedings are filed. *Transportation Co.* v. *Chicago*, 99 U. S. 635, and other cases cited.

Same.—The Court of Claims has jurisdiction to award judgment for just compensation for property taken and damages incident thereto only where the property has been taken without the institution of condemnation proceedings.

Mr. Joseph Siegler for plaintiffs.

Mr. Donald B. MacGuineas, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

The above cases present the same issues and were argued together. They are consolidated for the purpose of this opinion.

Plaintiffs sue for damages incident to the condemnation of land in the city of Newark, New Jersey, each of them owning a leasehold interest on parts thereof. On the part leased by the Dominion Smelting & Refining Corporation it had constructed a plant and had equipped it with machinery for the smelting and refining of lead. Plaintiff Seaboard Storage Corporation had a lease on two warehouses known as Warehouse No. 2 and Warehouse No. 3. Warehouse No. 3 was located on a part of the property condemned.

In each case the defendant has filed a plea of a prior suit pending and a plea to the jurisdiction of the court.

The petition in the Dominion Smelting & Refining Corporation case alleges that on February 4, 1942, the office of the Supervisor of Shipbuilding, United States Navy, New York City, wrote plaintiff confirming a conversation held on February 2, 1942, in which plaintiff was informed that the Navy intended to take possession of the property on which its plant was located, and that it would be necessary for plaintiff to completely vacate the premises by February 14, 1942. Plaintiff vacated the premises, as requested, and the defendant took possession on February 15, 1942.

The petition in the Seaboard Storage Corporation case alleges that the Supervisor of Shipbuilding, United States Navy, New York City, wrote it on February 3, 1942, confirming a conversation also held on February 2, 1942, in which it was informed that the Navy intended to take possession of its warehouse No. 3, and requesting it to vacate it by February 16, 1942. Plaintiff did as it was requested to do, and the defendant took possession on February 16, 1942.

Following this, on March 3, 1942, a petition for condemnation of the land on which plaintiffs' plant and warehouse were situated was commenced in the United States District Court for the District of New Jersey. Both plaintiffs were made parties thereto. On the same date there was filed a declaration of the taking of these lands and there was deposited in the Registry of the Court the sum of $675,000, which it was estimated was just compensation for the lands taken, to be distributed among the parties entitled thereto.

On March 16, 1942, an order was entered in the condemnation proceedings adjudging that the United States was entitled to take the property and vesting the title thereto in the United States, and it was further ordered that the amount deposited in the Registry of the Court should be held subject to the further orders of the court.

The petition in condemnation recited that it was filed pursuant to the Acts of July 29, 1941 (55 Stat. c. 328, 608), August 25, 1941 (55 Stat. c. 409, 669, 680), August 1, 1888 (25 Stat. 357), and February 26, 1931 (46 Stat. 1421). The first mentioned Act appropriates certain money for naval instal-

lations, and in section 2 grants authority for the acquisition of such lands and machinery and equipment as the Secretary of the Navy should determine best suited to the purpose. The Act of August 25, 1941, appropriated additional money for this purpose, and the Act of August 1, 1888, provided for condemnation of land by suit in a United States Circuit or District Court of the District in which the real estate was situated. The Act of February 26, 1931, provided for the filing of a declaration of taking.

Under these Acts the only court in which condemnation proceedings could have been brought was in the court in which they were brought, to wit, the District Court for the District of New Jersey. That court has full jurisdiction to render a judgment for just compensation for the property taken, and to distribute the proceeds of that judgment among the various persons having an interest in that property in accordance with their respective interests. Plaintiffs in that suit can assert every right they have for just compensation for the taking of their interest in the property.

Just compensation includes not only the value of the various interests in the lands taken, but also every other element which goes to make up just compensation. For instance, if only a portion of a plaintiff's land has been taken, the plaintiff may recover whatever diminution in value has been suffered by the remainder as a result of the taking of a part. *Bauman* v. *Ross*, 167 U. S. 548, 574; *United States* v. *Grizzard*, 219 U. S. 180. The value of buildings on the land taken may ordinarily be recovered. Lewis on *Eminent Domain*, Volume 2, Third Edition, sec. 726, p. 1269. The special value of the land, due to its adaptability for use in a particular business, must also be taken into consideration in determining just compensation. *Joslin Co.* v. *Providence*, 262 U. S. 668, 675; *Mitchell* v. *United States*, 267 U. S. 341. Some courts hold that the cost of removal of personal property from the land taken may be recovered, Lewis on *Eminent Domain*, Volume 2, Third Edition, p. 1274; *General Motors Corp.* v. *United States*, 140 F. (2d) 873; *Des Moines Wet Wash Laundry* v. *Des Moines*, 197 Iowa, 1082, although the weight of authority is to the contrary; *Joslin Co.* v. *Providence*, *supra;* Lewis on *Eminent Domain*, Volume 2, Third

Edition, sec. 728, p. 1276. See discussion of this question in the June 1944 issue of the North Carolina Law Review, Vol. 22, No. 4, pp. 325–333. Other damages may also be taken into consideration in fixing just compensation. *Shoemaker* v. *United States*, 147 U. S. 282, 321. But it is generally held that damage to one's business is not an element of just compensation. *Joslin Co.* v. *Providence*, *supra; Mitchell* v. *United States*, *supra.*

It is not our function, however, to determine in this suit what damages plaintiffs are entitled to recover. Whatever they are entitled to recover, they can recover only because they are a part of the just compensation required by the Constitution to be paid for the taking of their property for public use. *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Gibson* v. *United States*, 166 U. S. 269; *Joslin Co.* v. *Providence*, *supra; Mitchell* v. *United States*, *supra; Sharp* v. *United States*, 191 U. S. 341; *United States* v. *Grizzard*, *supra.* By the Act of August 1, 1888, *supra*, jurisdiction to determine this question is vested exclusively in the District Court in which the condemnation proceedings are filed.

This court has jurisdiction to award judgment for just compensation for property taken and damages incident to the taking only where the property has been taken without the institution of condemnation proceeedings. Condemnation proceedings have been instituted in these cases. The court in which they were instituted has exclusive jurisdiction.

For the reasons stated, the defendant's pleas will be sustained and plaintiffs' petitions dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

JOHNSTOWN COAL & COKE COMPANY OF NEW YORK, INC., v. THE UNITED STATES

[No. 44330. Decided November 6, 1944]

On the Proofs

Increased labor costs under National Industrial Recovery Administration Act; suit by agent.—Under the Act of June 25, 1938, (52 Stat. 1197) there can be no recovery where there is no proof that increased labor costs were incurred by plaintiff in the performance of Government contract by reason of the enactment of the National Industrial Recovery Administration Act (48 Stat. 195). See *McShain* v. *United States*, 87 C. Cls. 581.

Same.—It is not permissible for an agent, except an attorney at law, to represent another person in litigation.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for the plaintiff.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff herein, Johnstown Coal & Coke Company of New York, Inc., is a corporation of the State of New York. At the times here involved it was the exclusive sales agent of Johnstown Coal & Coke Company, a Delaware corporation (hereinafter referred to, except in quoted writings, as "Johnstown of Delaware"), and of Greenbrier Smokeless Coal Company, a West Virginia corporation (hereinafter referred to, except in quoted writings, as "Greenbrier"), for coal that is the subject-matter of this suit. Johnstown of Delaware and Greenbrier were owners and operators of coal mines. The capital stock of Greenbrier was owned by Johnstown of Delaware.

Under the agency agreements plaintiff was to receive five cents per ton of the selling price f. o. b. mines for all coal shipped on Government business secured by competitive bidding, as was the business here involved.

Suit is brought pursuant to the jurisdictional act of June 25, 1938, 52 Stat. 1197.

2. May 22, 1933, plaintiff entered into a contract with the defendant, represented by Robert T. Willkie, Captain, Q. M. Corps, as contracting officer, whereby the plaintiff, for a consideration stated at various amounts per net ton, agreed to furnish and deliver to the defendant, at points named, designated net tons of bituminous coal, deliveries to be made according to schedules stated in the contract. Among other things these schedules showed (1) the name of the mine; (2) the location thereof; (3) the operator; (4) tonnage; (5) unit and (6) total prices, as follows:

> Schedule A—(1) Crichton #1; (2) Crichton, W. Va.; (3) Johnstown Coal & Coke Co.; (4) 3,000 net tons; (5) $4.27; (6) $12,810.00.
>
> Schedule B—(1) Crichton #1; (2) Crichton, W. Va.; (3) Johnstown Coal & Coke Co.; (4) 3,016 net tons; (5) $3.65; (6) $11,008.40.
>
> Schedule C—(1) Crichton #2; (2) Bellburn, W. Va.; (3) Johnstown Coal & Coke Co.; (4) 6,958 net tons; (5) $4.11; (6) $28,597.38.
>
> Schedule D—(1) Manor #1; (2) Vindex, Md.; (3) Manor Coal Co.; (4) 1,800 net tons; (5) $3.49; (6) $6,282.00
>
> Schedule E—(1) Crichton #2; (2) Bellburn, W. Va.; (3) Johnstown Coal & Coke Co.; (4) 3,200 net tons; (5) $3.94; (6) $12,608.00.

This contract was given serial number W 626 qm-14269 and article 3 thereof was as follows:

> 3. *Wage scales.*—The contract price specified herein for the coal is based upon the wage scales in effect with mine employees on the date of opening of bids, and any increase or decrease in the cost of production of said coal caused by changes in such wage scales shall correspondingly increase or decrease the contract price of coal on any tonnage mined and shipped thereafter not in arrears at the time the change in wage scales becomes effective: *Provided, however,* That in event of any such increase in cost of production due to increase in wage scales, the claim shall be presented within 60 days and supported by the affidavit of the superintendent or corresponding officer of the mine or mines from which the coal was produced and by report of a certified public accountant showing the cost of mining the coal before the increase in the wage scales, the amount of the increase in the wage scales after the date of the opening of

bids, and the amount of such increase applicable to the coal delivered under this contract after the date of such increase. The books of the contractor shall be so kept as to show the foregoing facts and shall be open to inspection by an authorized officer or employee of the Government. No increase over the contract price shall be allowed unless the claim is so presented and the books of the contractor are so kept. In event of a decrease in cost of production due to decrease in the wage scales, the decrease in the contract price shall be computed on the basis of the affidavit or affidavits of the superintendent or other corresponding officer of the mine or mines from which the coal was produced or upon other evidence. When there has been no change in the wage scales during the production of the contract coal, the contractor shall so certify on invoices or vouchers submitted for payment.

A copy of the contract is in evidence and made a part hereof by reference.

3. June 28, 1933, plaintiff entered into another contract with the defendant, whereby plaintiff, for a consideration stated at various amounts per net ton, agreed to furnish and deliver to the defendant, at certain points pertaining to the Naval establishment, designated net tons of bituminous coal, deliveries to be made according to schedules stated in the contract. Among other things these schedules showed (1) the name of the mine; (2) the location thereof; (3) the operator; (4) tonnage; (5) unit and (6) total prices, as follows:

Schedule lot 388—(1) Portage #6; (2) Portage, Pa.; (3) Johnstown Coal & Coke Co.; (4) 1,600 net tons; (5) $3.85; (6) $6,160.00.

Schedule lot 389—(1) Portage #6; (2) Portage, Pa.; (3) (operator not named); (4) 900 net tons; (5) $4.43; (6) $3,987.00.

Schedule lot 393—(1) Portage #6; (2) Portage, Pa.; (3) plaintiff; (4) 27,500 net tons; (5) $3.50; (6) $96,-250.00.

Schedule lot 394—(1) Portage #6; (2) Portage, Pa.; (3) plaintiff; (4) 1,900 net tons; (5) $3.40; (6) $6,460.00.

Schedule lot 397—(1) Crichton #2; (2) Bellburn, W. Va.; (3) plaintiff; (4) 650 net tons; (5) $3.43; (6) $2,229.50.

Schedule lot 401—(1) Crichton #2; (2) Bellburn, W. Va.; (3) plaintiff; (4) 5,000 net tons; (5) \$3.55; (6) \$17,750.00.

Schedule lot 402—(1) Crichton #2; (2) Bellburn, W. Va.; (3) (operator not named); (4) 600 net tons; (5) \$3.55; (6) \$2,130.00.

Schedule lot 403—(1) Crichton #2; (2) Bellburn, W. Va.; (3) plaintiff; (4) 1,000 net tons; (5) \$3.55; (6) \$3,550.00.

This contract was given serial number NOs. 32022 and article 3 thereof was as set out in finding 2 as article 3 of contract W 626 qm 14269.

A copy of the contract (without the signatures) is filed in evidence and made a part hereof by reference.

4. Under these two contracts the plaintiff furnished the defendant certain coal on which the claim made herein is based. The deliveries were as follows:

Contract	*Mine*	*Net tonnage*	
	(Aug. 10–Sept. 30, 1933)		
W 626 qm 14269	Crichton #2	5, 829. 00	
NOs. 32022	Crichton #2	771. 95	
			6, 600. 95
	(October 1, 1933, Mch. 31, 1934)		
NOs. 32022	Crichton #2	5, 283. 35	5, 283. 35
	(April, May, June, 1934)		
NOs. 32022	Crichton #2	1, 237. 50	
NOs. 32022	Portage #6	6, 056. 70	7, 294. 20
		19, 178. 50	19, 178. 50

The operator of coal mine Crichton #2 was in fact Greenbrier, and the operator of coal mine Portage #6 was Johnstown of Delaware.

5. After the contracts described in findings 2 and 3 were entered into, Greenbrier and Johnstown of Delaware, the producing companies, became bound by the Code of Fair Competition for the Bituminous Coal Industry approved by the President September 29, 1933, effective October 9, 1933. The producing companies put into effect three wage increases August 1, 1933, October 2, 1933, and April 2, 1934.

6. The contract price on each of the two contracts has been adjusted under article 3 thereof set forth verbatim in finding 2 herein, and as adjusted has been paid by the defendant.

7. The evidence does not adequately show either the existence of, or the amount of, increased costs incurred either by plaintiff or by the coal operators whose coal plaintiff sold to the Government as a result of the enactment of the National Industrial Recovery Act, other than the increased wages already compensated for as shown in finding 6.

8. Plaintiff did not incur any of the increased costs asserted in this suit. It was the selling agent for the operating companies which incurred the increased costs, if anyone did. Plaintiff has not paid anything to the operating companies on account of these asserted claims, and recognizes no liability to them in regard to the claims except the duty to turn over to them any amount which it might recover in this suit.

The court decided that the plaintiff was not entitled to recover.

Per Curiam: The plaintiff, on May 22 and June 28, 1933, made two contracts to sell coal to the Government. The plaintiff was in fact acting as the selling agent for two operating coal companies. The contracts each contained a paragraph, quoted in full in finding 2, providing that the contract price was to be increased if labor costs increased the cost of producing the coal contracted for. Three wage increases were made by the producing companies during the period of performance, and the contract prices were adjusted and paid accordingly.

This suit is brought under the act of June 25, 1938, giving to contractors who entered into contracts with the Government before August 10, 1933, and whose costs of performance were increased as a result of the enactment of the N. R. A., a right to sue for such increased costs, if they had filed claims in time under the earlier act of June 16, 1934, which had a similar purpose, but was not fully effective.

The plaintiff, which, as we have said, did not produce the coal which it contracted to sell to the Government, incurred no increased costs which are involved in these claims. Since the operating companies which did incur the increased costs, if anyone did, could, under the 1938 act, have sued for them, there seems to be no good reason why the plaintiff should be suing on their causes of action. *McShain* v. *United States*, 87 C. Cls. 581. The plaintiff, after the statute of limitations had run against suits by the operating companies, filed a motion to amend its petition so as to show that it was bringing this suit as the agent of those companies, and this court denied the motion. We are not aware of any situation in which it is permissible for an agent, except an attorney at law, to represent another person in litigation.

But apart from the reason just given which would probably prevent recovery by the plaintiff, its suit must fail for lack of proof. There is no adequate proof that increased costs were incurred, or as to what was the amount of such increased costs, if there were any.

The plaintiff's petition will be dismissed. It is so ordered.

HENRIETTE PLAUT v. THE UNITED STATES

[No. 45598. Decided November 6, 1944]

On the Proofs

Income tax; no evidence to establish that stock became worthless during tax year.—Where there is no evidence of sales of the stock of a corporation, or of offers to sell or buy the stock, during the relevant tax period, and where the financial statement of the corporation for the period does not show that the stock was worthless at the end of the tax year; it is *held* that plaintiff is not entitled to recover under Section 23 (e) (2) of the Revenue Act of 1936 as for a loss incurred in a "transaction entered into for profit, though not connected with the trade or business."

The Reporter's statement of the case:

Mr. Llewellyn A. Luce for the plaintiff.

Mr. H. S. Fessenden, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of New York City.

2. At the dates shown, plaintiff made the following purchases of the common capital stock of City Housing Corporation, paying therefor the amount of cash stated:

July 17, 1924	10 shares of stock of a par value of $100	$1,000
Mar. 7, 1925	20 shares of stock of a par value of $100	2,000
Aug. 18, 1925	15 shares of stock of a par value of $100	1,500
Dec. 4, 1926	30 shares of stock of a par value of $100	3,000
Dec. 22, 1926	20 shares of stock of a par value of $100	2,000
Oct. 14, 1927	35 shares of stock of a par value of $100	3,500
Nov. 10, 1927	20 shares of stock of a par value of $100	2,000
Jan. 15, 1929	30 shares of stock of a par value of $100	3,000
Totals	180	$18,000

Plaintiff owned all of that stock at least until November 19, 1943, when a stipulation was filed in this proceeding.

3. Plaintiff duly filed her individual Federal income tax return for the calendar year 1936 and on March 15, June 12, September 15, and December 11, 1937, paid in four equal quarterly installments the total sum of $2,570.16 as Federal income taxes shown due for that year. No deduction was made in that year on account of the alleged worthlessness of the foregoing stock of City Housing Corporation. Such a deduction was made, however, in an amended return filed July 30, 1937, and in a claim for refund of $492.02 which was prematurely filed on August 4, 1937, based upon the amended return.

May 20, 1938, plaintiff filed a claim for refund of $2,315.69 for 1936 based on two grounds, one of which was the allegation that stock of City Housing Corporation became worthless in 1936. The other ground of the claim is not involved in this proceeding. On August 9, 1938, and also on

February 24, 1939, plaintiff filed claims for refund of $2,304.99 for 1936, each claim being based upon the allegation of a loss of $18,000 through worthlessness of the stock of City Housing Corporation, and showing a deduction of $18,000 from net income and a reduction of tax on that account.

4. May 10, 1940, the Commissioner of Internal Revenue by registered mail rejected each and all of the claims for refund theretofore filed by plaintiff.

5. City Housing Corporation is a New York corporation organized in the year 1924. It was organized as a limited dividend corporation for the purpose of contributing to better housing and community planning and living. The first enterprise undertaken by the corporation was the development in Long Island City, New York, known as "Sunnyside." Approximately 70 acres of land were purchased and on that site the project was erected which consisted of one-, two-, and three-family houses and apartments accommodating 1,500 families. It was substantially completed by June 1935.

6. In 1927 City Housing Corporation purchased approximately 1,350 acres of land at Fairlawn for a development known as "Radburn." During 1928 and 1929 there was built at Radburn a series of one- and two-family houses accommodating over 300 families, an apartment house for approximately 90 families, and a store and office building and various other buildings, including garages, gasoline stations, and a sewage disposal plant. It was expected that approximately 400 houses would be built each year and that a carefully planned model city would be completed within a few years. The depression necessitated a radical curtailment of the building program so that from 1931 to 1935 practically no new building was done at Radburn. Later, however, with the aid of mortgages insured by the Federal Housing Administration, building was resumed and during 1939 thirty homes were erected and sold.

7. As a result of the extended depression in real estate values preceding 1935, the properties of City Housing Corporation failed for several years before 1934 to carry the fixed charges on the corporation's obligations. During 1934

the corporation deemed it necessary to reorganize under section 77 (b) of the Bankruptcy Act and a petition was accordingly filed by it in the United States District Court for the Southern District of New York on August 1, 1934, which petition was approved by the court on that date. The corporation felt that a successful reorganization required (1) that the fixed obligations of the corporation should be placed, so far as possible, upon an income basis and (2) that a larger degree of separation should be made between the Sunnyside and Radburn developments.

8. In connection with the petition referred to in the preceding finding, the corporation submitted a plan of reorganization to the court on June 4, 1935, and that plan was approved by the court on March 6, 1936. The plan of reorganization is attached to a stipulation filed in this proceeding as Exhibit 4 and it is incorporated herein by reference.

9. In accordance with the plan of reorganization two new corporations were formed, namely, Sunnyside Properties, Inc., to take over the assets which had been deposited as collateral for the Sunnyside bond issue, and Radburn, Inc., to do the same in connection with Radburn. City Housing Corporation became the owner of the common stock of each of these new companies but separate and independent boards of directors were set up to manage the affairs of the two new corporations. City Housing Corporation continued its existence as a functioning corporation at least until November 19, 1943, but most of its former activities were taken over by the two new corporations when the plan of reorganization was approved by the court.

10. At the time of the reorganization City Housing Corporation had outstanding $1,729,000 in 6 percent mortgage bonds on which the maturity date was July 1, 1942, and which were sometimes referred to as "Sunnyside bonds." These bonds were secured by a trust agreement under which mortgages were deposited as collateral. The mortgages were largely on developed property at Sunnyside but also included property at Radburn. At the time of the reorganization accrued interest on the bonds amounted to $46,107.67.

In the plan of reorganization the following provision was made for the treatment of the Sunnyside bonds:

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> The holders of the Sunnyside bonds will surrender the said bonds for cancellation. They will receive, in exchange therefor, bonds of Sunnyside, Inc. (hereinafter sometimes called "New Sunnyside Bonds") in a face amount equal to the bonds surrendered. The $31,000 of Sunnyside bonds held by City Housing Corporation will be cancelled, and no new bonds issued therefor. The New Sunnyside Bonds will mature on April 1st, 1950. They will carry interest at the rate of 6% per annum, payable only out of and to the extent that net earnings of Sunnyside, Inc., as hereinafter defined, are available therefor. Such interest will be cumulative, at the rate of 6% per annum, and will be payable on the 1st day of April in each year, beginning with the year 1936. The New Sunnyside Bonds will be callable on any interest date, on thirty days prior notice, at the face amount thereof, plus accrued interest. The New Sunnyside Bonds will be guaranteed as to principal and as to interest to the extent that the same shall be payable, by City Housing Corporation. The Certificate of Incorporation of Sunnyside, Inc., will provide that no dividends may be paid on its Common stock nor on its Preferred stock until the New Sunnyside Bonds are paid in full, with all accumulated interest thereon. It will also provide that no dividends may be paid on its Common stock until its Preferred stock is redeemed.

11. City Housing Corporation also had outstanding at the time of the reorganization $2,178,080 in seven year 6 percent Radburn secured notes. These notes were secured by certain real property subject to sundry mortgages located at Radburn and various obligations on other property located at Radburn. At the time of the reorganization the accrued interest on these Radburn notes amounted to at least $163,356.

The plan of reorganization contained the following provision for the treatment of the Radburn notes:

> The holders of the Radburn notes will surrender the same for cancellation. They will receive, in exchange therefor, notes of Radburn, Inc. (hereinafter sometimes called "New Radburn Notes"), in a face amount equal to the Radburn notes surrendered. The New Radburn Notes will mature on April 1st, 1950. They will carry interest at the rate of 6% per annum, payable only out of and to the extent that there are net earnings of Radburn, Inc., as hereinafter defined available therefor.

Such interest will be cumulative at the rate of 6% per annum, and will be payable on the 1st day of April in each year, beginning with the year 1936. The New Radburn Notes will be callable on any interest date at their face amount, plus accrued interest, on thirty days prior notice. The New Radburn Notes will be guaranteed as to principal and as to interest to the extent that the same shall be payable, by City Housing Corporation.

The Certificate of Incorporation of Radburn, Inc., will provide that no dividends may be paid upon its Common stock, nor on its Preferred stock, until the New Radburn Notes are paid in full with all accumulated interest thereon. It will also provide that no dividends may be paid upon its Common stock until the Preferred stock is redeemed.

12. At the time of the reorganization, City Housing Corporation had outstanding common stock of a par value of $2,954,600 which included the $18,000 in capital stock which had been purchased by plaintiff as shown in finding 2. No change was made in that capitalization through the reorganization and it remained at that figure at least until December 31, 1939. The plan of reorganization contained the following provision with respect to the treatment of the common stock of City Housing Corporation:

No dividends will be declared or paid upon the Common stock of City Housing Corporation, and none of said stock shall be redeemed by the Company unless and until (1) the New Sunnyside Bonds, together with all interest due thereon, have been completely paid and discharged; (2) the New Radburn Notes, together with all interest due thereon, have been completely paid and discharged; (3) the 6 percent Cumulative Preferred stock of Sunnyside, Inc., has been redeemed in full; (4) the 6 percent Cumulative Preferred stock of Radburn, Inc., has been redeemed in full.

13. Pursuant to the plan of reorganization holders of interest notes issued in lieu of payment of interest on Sunnyside bonds and persons entitled to past due interest on Sunnyside bonds received 6 percent cumulative preferred stock of Sunnyside Properties, Inc. Holders of Radburn unsecured notes and Radburn secured notes on which interest had been allowed to accrue received 6 percent cumulative preferred

stock of Radburn, Inc., for the face amount of the unsecured notes and interest on the secured notes. City Housing Corporation guaranteed the payment of the par value and accrued dividends on these stocks on the liquidation of the corporation.

14. At the time of the reorganization, City Housing Corporation had outstanding certain underlying first mortgages in the amount of $1,645,746.22 and the plan of reorganization made the following provision for the treatment of these underlying mortgages:

> The lien of the underlying mortgages will remain undisturbed according to their present tenor; *except* that for a period of 60 days following the confirmation of this plan, no action at law or in equity to foreclose or call due any of the said mortgages shall be brought by the holders thereof; and during said period of 60 days any owner of the property affected by said mortgages shall be free to cure any and all defaults thereunder; and *except* further that no liability shall be asserted against City Housing Corporation on the bonds which said mortgages secure, except subject to the provisions of Paragraph 9 hereof.

15. City Housing Corporation also had outstanding contingent obligations in the amount of $3,685,000 wherein it had guaranteed the principal and interest on certain mortgages on property not owned by the company and the plan of reorganization provided that—

> No liability shall be enforced against City Housing Corporation on the contingent obligations of the Company or on the bonds of the Company which are secured by the underlying mortgages prior to the due date of the New Sunnyside Bonds or the New Radburn Notes. * * *

16. In the statement of assets and liabilities of City Housing Corporation as of March 1, 1935, submitted with the plan of reorganization that corporation showed assets in the total amount of $11,332,884.87. The largest item among the assets was undeveloped land in the amount of $3,560,094.56. This amount represented cost plus carrying expenses which had been capitalized. Liabilities exclusive of common stock in the amount of $2,954,600 were shown in the sum of $9,729,418.23. A deficit was also shown at March 1, 1935, of $1,351,133.36.

17. May 1, 1940, City Housing Corporation made a report to its stockholders in which it outlined what had occurred during the reorganization and reviewed the conditions not only with respect to itself but also with respect to Sunnyside Properties, Inc., and Radburn, Inc. In regard to City Housing Corporation the following statement appears in the report:

> The principal assets which remained the property of this corporation consisted of the rental properties at Sunnyside; that is to say, certain apartment houses, garages, stores, etc. In spite of the fact that most of these properties were encumbered by first mortgages made before the depression as well as by second mortgages held by Sunnyside Properties, Inc., it has been possible to meet current charges and maintain the properties in good physical condition. Rental conditions also have been excellent throughout the period in question. In one case, however, the First Cooperative Unit at Sunnyside, the income became insufficient to pay operating expenses and interest on first and second mortgages and this property was conveyed in lieu of foreclosure and for a small consideration to Sunnyside Properties, Inc. Certain plots of vacant land at Sunnyside were similarly conveyed to Sunnyside Properties, Inc.

18. The report to the stockholders referred to in the preceding finding had attached thereto balance sheets and profit and loss statements for City Housing Corporation for the years ending December 31, 1936, to December 31, 1939, inclusive, which showed the following for the year ending December 31, 1936:

CITY HOUSING CORPORATION

Balance Sheet

December 31, 1936

ASSETS

Real Estate	$2, 346, 233. 91
Mortgages Receivable	275, 617. 37
Notes Receivable	33, 791. 27
Accounts Receivable	52, 649. 42
Stock Associated Corporations	37, 522. 49
Inventories—Office Furniture, etc	10, 833. 72
Prepaid Expenses	4, 623. 53
Cash	78, 166. 39
Total Assets	2, 839, 438. 10

LIABILITIES

Mortgages Payable	$2,224,836.55
Notes Payable	942.80
Accruals and Reserves	45,215.56
Accounts Payable	4,303.25
Total Liabilities	2,275,298.16

CAPITAL STOCK AND DEFICIT

Capital Stock	2,954,600.00
Deficit	(2,390,460.06)
	2,839,438.10

PROFIT AND LOSS STATEMENT

INCOME

Operating Net after Mortgage Interest and Property Taxes	85,044.03
Interest	20,364.74
Gross Income	105,408.77

EXPENSE

General and Administrative	33,176.54
Maintenance, Advertising and Sales Expense, Sunnyside & Radburn	4,032.27
Miscellaneous Taxes	942.06
Legal and Reorganization Expense	1,232.47
	39,383.34

CAPITAL LOSSES

CAPITAL LOSSES

Loss Real Estate Equities and 2nd Mortgages through Foreclosure of 1st Mortgages	$371,291.70
Mortgage Discounts and Adjustments	15,043.84
Loss on Sale of Property	9,904.00
Write-off of Uncollectible Accounts	4,449.62
Loss of Assets through consummation of Reorganization	347,677.13
	787,749.63
Depreciation Buildings and Equipment	87,520.87
Total Expense, Losses and Depreciation	875,270.50
Net Loss	769,861.73

19. While the operating income of City Housing Corporation for each of the years ended December 31, 1937, to December 31, 1939, exceeded the operating expenses, capital losses were sustained in each of those years which with depre-

ciation on buildings and equipment produced net losses for the fiscal years ended December 31, 1937, December 31, 1938, and December 31, 1939, in the respective amounts of $179,517.46, $50,268.10 and $45,243.59. The deficit of $2,390,460.06 shown at December 31, 1936, increased each year with the result that by the year ended December 31, 1941, such deficit amounted to $2,810,171.85. Radburn, Inc. and Sunnyside Properties, Inc., likewise sustained losses during the same period.

20. In her return for the fiscal year ended December 31, 1934, plaintiff claimed a deduction on account of the alleged worthlessness of the stock owned by her in City Housing Corporation and referred to in finding 2. In determining plaintiff's tax liability for that year the Commissioner disallowed that deduction with the following explanation:

> The above deficiency in tax is predicated upon a holding by this office that the common stock of the City Housing Corporation did not become worthless until subsequent to the taxable year ended December 31, 1935.

As shown in findings 3 and 4, plaintiff filed claims for refund in which a deduction was claimed on the ground that her stock became worthless in 1936, and the Commissioner rejected those claims.

21. The evidence does not show that the stock of City Housing Corporation, owned by plaintiff, became worthless in the year 1936.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff claimed a refund of income taxes paid by her for the year 1936, on the ground that common stock of City Housing Corporation, owned by her, had become worthless during that year. The Commissioner of Internal Revenue rejected her claim, and she brings this suit. She is entitled to recover, under Section 23 (e) (2) of the Revenue Act of 1936, if in fact her stock became worthless during that year, since such a loss would be one incurred in a "transaction entered into for profit, though not connected with the trade or business."

The business history of City Housing Corporation is recited in the findings of fact, and will not be repeated here. The Corporation, after a promising beginning, encountered the depression, and became the object of a reorganization under Section 77 (b) of the Bankruptcy Act. Under the reorganization, the liabilities which the Corporation had incurred in the development of its Sunnyside property were made the direct liabilities of a new corporation called Sunnyside, Inc., to which were transferred the securities which had been collateral to those liabilities. The Corporation's Radburn liabilities were similarly segregated. The equity of the Corporation in the two properties was preserved by giving it the common stock of the two new companies, so that it and its stockholders such as the plaintiff were not frozen out of any valuable interest which might have inhered in the direct ownership which the Corporation had of those properties before the reorganization.

The only evidence which we have of the value of the common stock of the Corporation before 1936, and at the end of 1936, are the Corporation's own statements of its assets and liabilities. In a statement as of March 1, 1935, submitted with the plan of reorganization, and summarized in finding 16, it appears that the corporation had assets of $11,332,884.87 and liabilities, other than common stock, of $9,729,418.23. The par value of the common stock was $2,954,600. According to that statement, the common stock represented an equity of about one-half of its par value. The Corporation's balance sheet of December 31, 1936 (see finding 18), after the reorganization, of course, reflected that it had parted with some of its assets, and been relieved of some of its direct liabilities, as we have seen. Taking those changes into consideration, it had still lost ground, financially, since it showed assets of $2,839,438.10 and liabilities other than common stock of $2,275,298.16, leaving an excess of only $564,139.94 as representing the value of the stock, the par value of which was $2,954,600. The Corporation had also heavy contingent liabilities, under the reorganization plan and otherwise. But this financial statement does not show that the stock of the Corporation was worthless at the end of 1936. There is no evidence of sales, or offers to sell or to buy the stock during

the relevant period, which might affect the conclusion drawn from the financial statement.

The plaintiff's petition will be dismissed. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ROBERT Y. CREECH v. UNITED STATES

No. 44729

C. A. THOMAS AND INMAN W. WEEKS, AS ADMINISTRATORS OF THE ESTATE OF CHARLES E. THOMAS, DECEASED, v. UNITED STATES

No. 44730

SHORE ACRES PLANTATION, INC., A FLORIDA CORPORATION v. UNITED STATES

No. 44731

[Decided October 2, 1944. Plaintiffs' motions for new trial overruled January 8, 1945]*

On the Proofs

Flood control; Government not liable, as for a taking, for consequential damages.—In the construction by the Government of the levee to control the waters of Lake Okeechobee, in Florida, it is *held* that whatever damage resulted to the crops of the plaintiffs was consequential, as shown by the evidence, and such damage, if any, was the result of authorized action of the Government in connection with navigation and flood control, for which no remedy is afforded in the courts under the Fifth Amendment. *Gibson* v. *United States*, 166 U. S. 269, and other subsequent, similar cases cited.

Same; proof insufficient under provisions of Special Jurisdictional Act.—The Special Jurisdictional Act (52 Stat. 1399) under which the instant suits were brought does not concede liability on the part of the Government; and plaintiffs have not, by satisfactory proof, established a right to recover from the Government the damages alleged to have been sustained by them.

*Plaintiff's petitions for writs of certiorari pending.

The Reporter's statement of the case:

Mr. W. H. Poe for plaintiffs.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiffs seek to recover compensation for destruction of or damage to their growing crops in 1937 by the waters of Lake Okeechobee, in Florida, which they allege resulted from the construction by defendant of a levee about 31 feet above mean sea level around the southern portion of the lake from the St. Lucie Canal, about midway of the lake on the east shore, to the Caloosahatchee Canal, about midway of the lake on the west shore.

The levee and appurtenant drainage locks and canals were completed and in operation late in 1936 before plaintiffs planted their crops in the winter months of 1937.

Plaintiffs claim, first, that they are entitled to recover just compensation, including interest, as for a taking of their property, i. e., crops, for a public purpose, under the Fifth Amendment; they claim, secondly, that if they are not thus entitled to recover, they are entitled under a Special Act of Congress to have judgment for the amount of loss or damage suffered by reason of injury to or loss of their crops as a result of the lands being overflowed by the waters of Lake Okeechobee in December 1937.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. These cases, which have been consolidated for trial, were commenced June 20, 1939, under and pursuant to an Act of Congress approved June 25, 1938, entitled "An Act conferring jurisdiction upon the Court of Claims to hear and determine the claims of Edward Forbes and others," (52 Stat. 1399), which Act, insofar as it relates to these petitions, is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment upon the claims of * * *;

C. E. Thomas; * * *; R. Y. Creech; * * *; Roscoe Lee Braddock; * * *; or other persons engaged in farming on Kreamer, Torry, or Ritta Islands, in Lake Okeechobee, for damage to or loss of crops alleged to have resulted from the construction of levees along the Caloosahatchee River and Lake Okeechobee drainage areas in Palm Beach County, Florida, by the Corps of Engineers, War Department, and from high waters caused thereby: *Provided*, That suits hereunder shall be instituted within one year from the enactment of this Act.

2. Robert Y. Creech, Charles E. Thomas, and Shore Acres Plantation, Inc., owned or leased, and farmed the lands, located on islands in Lake Okeechobee (hereinafter described in finding 10), during the winter season of 1937–1938 and prior to June 25, 1938.

3. Lake Okeechobee is a large fresh water lake, lying within, or bordering on, Palm Beach, Hendry, Highlands, Okeechobee, and Martin Counties, Florida. Its longest dimension, north to south, is about 36 miles and the width, east to west, is about 31 miles, and its water surface is about 730 square miles. The drainage area, principally to the north, as far as Orlando, is about 5,300 square miles, and the main tributary is Kissimmee River, which has its beginning at Lake Kissimmee about 85 miles north of Lake Okeechobee. The lowest point in Lake Okeechobee is about mean sea level. The Caloosahatchee River rises near the southwestern corner of the lake and flows southwesterly into the Gulf of Mexico. Formerly the lake, in times of high water, discharged over the entire low rim along its south border, southerly into and over a large body of swamp land, about 4,500 square miles, known as the Everglades. This was the principal outlet for the lake, though probably a considerable amount of flood waters found its way into the Caloosahatchee River, by way of Lake Hicpochee, to the west.

4. Since 1902 efforts have been made to drain portions of the Everglades, and numerous drainage districts were formed from time to time, after the passage of the Act in 1907, finally culminating in the Everglades Drainage District, all of which were created and existed under laws of the State of Florida. The first surveys were made prior to 1850 and some ditch

work was actually done by the State of Florida prior to 1889, but this pioneering did not materially alter the flood and overflow conditions in the area. A number of large canals were dug by these districts, notably, the St. Lucie, to the northeast, connecting with the St. Lucie River, and thence to the Atlantic Ocean; the West Palm Beach, Hillsboro, North New River, and Miami canals, all emptying into the Atlantic Ocean between Miami and Palm Beach; and the Caloosahatchee Canal emptying into the Caloosahatchee River, thence to the Gulf. Also a State levee was built around the south rim of the lake, as described in the next finding.

5. Several years prior to 1930 the Everglades Drainage District, created under state law, had constructed an earth levee along the east and south shores of the lake varying in height from about 22 to 24 feet elevation, but being built on ground having elevations between 16 and 19 feet, was only 3 to 4 feet above ground elevation with occasional places higher. The dike was pervious, contained gaps 30 to 40 feet in width and between Ritta Island and Little Bare Beach, to the northwest, there was a distance of about one mile where there was no dike. The elevation of the land at that point, however, was higher than the area over which the levee had been constructed. Flood gates were placed in the canals where they intersected this State levee.

This levee extended from Bascom Point, on the east shore of Lake Okeechobee, about three miles northeast of the north tip of Kreamer Island (which lies north of Torry and Ritta Islands involved in these proceedings) around the southern portion of the lake to a point on the southwest shore of the lake about eleven miles northwest of Ritta Island.

About 1926, after the above-mentioned state levee had been built, a road was constructed along the south shore of the lake substantially along the line of and behind or landward of the old levee. This road was made largely of the spoil thrown up in the construction of the dike, leveled off and later graded, surfaced, and made permanent. It ranged in elevation from 21 to 24 feet. This road extended beyond both ends of the levee for a number of miles northeast and northwest.

The locations of the old State levee and the road are shown on a drawing in evidence as defendant's exhibit H, the levee

being a red-pencil line superimposed on a light black line, while the road is indicated by fine black double lines.

6. This area of Florida is subject to hurricanes which, before the Government levees were constructed, blew much lake water out over surrounding territory, resulting in a large number of deaths of people living in the area and severe damage to property. The worst hurricanes in this area in recent years were those of 1926, 1928, and 1933. The hurricane of 1933, with a maximum wind velocity of about 80 miles per hour, caused a hurricane tide of approximately 5.6 feet. The hurricane of 1926, with a maximum wind velocity of about 90 miles per hour, caused a hurricane tide of 6.8 feet, and the hurricane of 1928, with a maximum wind velocity of 135 to 150 miles per hour, caused a hurricane tide of 13.2 feet. This latter hurricane which caused the death of about 2,400 persons and great property damage was the primary cause of the Federal Government undertaking the project described herein.

7. By the Rivers and Harbors Act of July 3, 1930, 46 Stat. 918, 925 (Senate Document No. 115, 71st Congress, 2nd Session), Congress authorized the Caloosahatchee River and Lake Okeechobee Drainage Areas, Florida, project, whereby the United States Engineers undertook the work of improving the Caloosahatchee River and Canal from Lake Okeechobee to the Gulf of Mexico, by straightening and dredging a channel designed to discharge 2,500 cubic feet of water per second from the lake; constructing a levee and a navigation channel 6 feet deep and 80 feet wide at lake elevation 14, following in general the south shore of the lake; protecting and improving the St. Lucie Canal and River; constructing levees along the north shore of the lake, and constructing all necessary controls such as gates, locks, and other pertinent works. This Act of July 3, 1930, provided as follows:

> That the following works of improvement are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the reports hereinafter designated. * * *.
> Caloosahatchee River and Lake Okeechobee drainage areas, Florida, in accordance with the report submitted in Senate Document Numbered 115, Seventy-first Con-

gress, second session, and subject to the conditions set forth in said document, except that the levees proposed along Lake Okeechobee shall be constructed to an elevation of thirty-one feet instead of thirty-four feet above sea level and shall be so built as to be capable of being raised an additional three feet, and that the United States shall perform the work of constructing all levees: *Provided*, That the State of Florida or other local interests shall contribute $2,000,000 toward the cost of the above improvements, in lieu of the contributions called for in the aforesaid document: *And provided further*, That no expense shall be incurred by the United States for the acquirement of any lands necessary for the purpose of this improvement.

Work was started on this project by the Corps of Engineers in November 1930, and was finally completed late in 1936, including the various locks, flood gates, spillways, and hurricane gates which were provided as integral parts of the project.

8. These works, among other things, were designed so far as practicable to control the lake within a range of 3 feet, that is, between elevations 14 and 17. The discharge capacity of the St. Lucie Canal is 5,000 second-feet at lake elevation 17, and of the Caloosahatchee Canal 2,500 second-feet at elevation 17, or a total discharge capacity for both at that elevation of 7,500 second-feet. Prior to the Government improvements under the act of July 3, 1930, the discharge capacity of the St. Lucie and Caloosahatchee canals did not exceed 5,500 cubic feet a second at Lake elevation of 17 feet above sea level. It was and is impossible at all times to draw water out of the lake as fast as it flows into it. Past records indicate that the lake has risen 2 feet or more within a period of 10 days, and also that if the lake be prevented from falling below 14 feet it cannot always be prevented from rising above 17, or even 18 feet, although the full discharge capacity is used. The defendant's engineers estimate that by doubling the capacity of St. Lucie Canal at a cost of approximately 2 or 3 million dollars, the lake could be further regulated within two or three tenths of a foot in some instances.

9. In connection with this project public hearings were held in 1927 to obtain expressions from interested parties in

the Lake Okeechobee district on the lake levels desired. Some interests wanted control between 14 and 17 feet, others 14 to 16, still others 15 to 18, and some 13 to 15 feet. The range of control determined upon by defendant was between 14 and 17 feet because, roughly, a 3-foot range was the minimum practicable range, and because these heights harmonized as much as possible the needs of flood control, navigation, and the complex and divergent interests of all concerned in the area. The farmers and others interested, including plaintiffs, became informed at that time and at all times thereafter of the intention and desire of the Government to control, so far as practicable, the minimum and maximum elevation of 14 to 17 feet. The adopted lower elevation of 14 assures an adequate depth for navigation; provides, as a rule, sufficient moisture for crops through natural flow and irrigation, and affords some protection to the soil itself from destruction by fire and from loss through subsidence. The upper elevation of 17 feet encourages successful cultivation by affording an ample, but a controllable amount of moisture for the crops; by protecting the land from fire and reducing its subsidence to a minimum; and provides a levee freeboard sufficient to protect the surrounding lands from all anticipated hurricane tides and winds. The 17-foot elevation is and was sought to be maintained, the defendant endeavoring to keep the lake stage to that height, except during the rainy season, particularly the hurricane period, for the convenience of pumping and irrigation, and because it was believed to be desirable to have a reserve against the ordinary dry season, as well as to provide against possible extremely dry periods.

10. Ritta, Torry, and Kreamer Islands are located in the lake near its southeast corner, Ritta Island being approximately one square mile in area, and Torry and Kreamer Islands separated from each other only by a narrow channel running in an easterly and westerly direction, Kreamer Island lying to the north of Torry Island, together being about 5 to 6 square miles in area. Ritta Island is separated from Torry and Kreamer Islands by a body of water about 5 miles wide known as South Bay, and Torry and Kreamer Islands, for most of their distances, are separated from the east shore of the lake by a body of water about 2

miles in width at its widest point called Pelican Bay. The southeast tip of Torry Island is separated from the east shore only by the navigation channel, dredged by the Government during the period 1931–1936, about 200 feet in width which also connects the waters of South Bay and Pelican Bay. The location of the islands in the lake is shown on the map in evidence as defendant's exhibit H.

11. The muck soil surrounding the lake, and on the islands in the lake, extends to depths of 10 to 11 feet. To a great extent it is made up of humus from untold ages of the growth and death of aquatic vegetation. Prior to cultivation of the land the muck was mostly covered by water and the dead vegetation decayed but little. Draining the water from the soil caused aerobic bacterial action to take place, the bacteria consuming the soil, thus causing a very gradual subsidence of the land. These islands have elevations varying from 16 to approximately 18.03 feet. However, only a relatively small area was at the lower elevation, the far greater portion of the area being between 17 and 18 feet, with a very small area reaching an elevation of 18 feet. Owing to the surrounding waters of the lake and the greater saturation of the soil there is materially less subsidence on the islands than on the mainland, and a minor percentage of the subsidence is due, also, to compaction from first cultivation.

12. During the winter months of each year northerly winds of velocities ranging up to 30 and occasionally to 50 miles an hour blowing across the lake, lasting for a period of 10 to 12 hours, are not unusual, and result in wind tides along the south shore ranging in heights up to approximately one foot with wind at 30 miles an hour, and up to approximately two feet at 50 miles an hour, above calm water level, depending upon the velocity of the wind, depth of water and the distance that the wind travels over the surface.

These tides are caused by the friction of the wind on the surface of the water, setting up a surface current and driving the water from the upwind to the downwind shore, the water assuming a gently sloping plane from one shore to the other and being lowered below the calm level water surface at the upwind shore to substantially the same extent as it is raised above such surface at the downwind shore. Wind tides, of

course, are always accompanied by wave action, which somewhat increases the height of the water above the wind tide elevation, especially close to the shore or barrier.

Occasionally the wind tides were high enough to cause the water to overflow the southern border of the lake and spread out to the old dike and in breached places, through it to the highway adjacent thereto, but not beyond the highway onto the Everglades except during hurricane tides. This tended to dissipate the wind tides to a slight degree, but not of sufficient degree to materially affect their height at Ritta or Torry Islands.

The height of the wind tides varies along the border of the lake. It is greater at the extreme south shore of the lake in South Bay on account of the longer fetch of the wind from the north than it is between Torry Island and the southeast shore in Pelican Bay, which has a shorter fetch. This causes the greater volume of water on South Bay to flow northward through the 200-foot channel between Torry Island and the levee with a current of about 3 miles per hour and affects the height of wind tides on the eastern side of Torry Island.

13. A general study of the characteristics of the lake over a period of many years prior to 1937 indicates that except for temporary rises from local rains the lake ordinarily commences to rise from general low elevation about June 1, and continues until sometime during the months of October and November, and sometimes during December, and at times January, when it begins to fall, the waters frequently attaining elevations higher than 17 feet in November, December, January, and February, with elevations of 18 to 19 feet and above not having been uncommon during those months. When the lake begins to fall the recession is generally continuous and rapid until summer.

The winter growing season may extend from October to March or April, and the practice followed by plaintiffs and others was to begin planting as soon as it was believed that the water had reached its peak and had fallen sufficiently to permit successful operations on the higher ground, extending the planting to lower ground as the water further receded. At times owing to high water elevation, only the higher elevations of the land were sufficiently dry to plant. Planting

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may commence from October, depending upon the elevation of the lake.

14. From 1912 to 1931, both inclusive, covering a period of 20 years prior to the commencement of the Government works, the average monthly calm water lake levels exceeded 17 feet in one or more of the months November, December, January, and February during 14 separate years, which years and which average monthly recorded levels in said months were as follows:

1912		1913		1914	
Month	Lake Level	Month	Lake Level	Month	Lake Level
Nov	21.7	Jan	20.4	Jan	19.4
Dec	21.3	Feb	20.7	Feb	19.4
1915		**1916**		**1922**	
Month	Lake Level	Month	Lake Level	Month	Lake Level
Nov	18.3	Jan	18.1	Nov	18.7
Dec	18.3	Feb	17.9	Dec	18.8
		Dec	17.1		
1923		**1924**		**1925**	
Month	Lake Level	Month	Lake Level	Month	Lake Level
Jan	18.6	Jan	19.2	Jan	19.1
Feb	18.3	Feb	18.2	Feb	19.0
Nov	18.6	Nov	19.2	Nov	18.0
Dec	18.2	Dec	19.2	Dec	17.7
1926		**1927**		**1928**	
Month	Lake Level	Month	Lake Level	Month	Lake Level
Jan	17.7	Jan	18.3	Nov	18.2
Feb	18.0	Feb	17.4	Dec	17.6
Nov	19.0				
Dec	18.6				
1930		**1931**			
Month	Lake Level	Month	Lake Level		
Nov	18.4	Jan	17.2		
Dec	17.6				

In 1929 the average daily calm water level of the lake exceeded 17 feet on the 2d, 3d, 4th, 5th, and 6th days of January, the maximum being 17.15, but the average monthly lake levels were below 17 feet.

During the same period, the average monthly calm water lake levels were 17 feet or less in each of the months of January, February, November, and December during the following years only: 1917, 1918, 1919, 1920, 1921.

Normal seasonal wind tides would further increase these lake levels.

15. No attempt whatever was made to regulate the lake waters during the period November 1, 1930, to November 1, 1931, during which period all gates were open and continued full discharge as a convenience during the Government construction period and in the installation of structures. During this period the maximum calm water lake levels were 13.8 in November and 12.9 in December 1930, and 12.8 in January 1931. Little, if any, effort was made to regulate the lake levels during the period of Government work from 1930 to 1936, inclusive. The facilities constructed by the Everglades Drainage District, a state organization, consisted, as hereinbefore mentioned, of the original St. Lucie Canal, of 5,000 cubic feet per second discharge capacity; the levee along the southern shore of the lake, and the drainage canals and gates through the levee and extending to the south. These canals were intended for draining the lands south of the lake and for irrigation purposes, and also for use in times of hurricanes. These structures appear to have been completed in 1926, and the period of the attempted control or regulation by the state of the lake levels extended over the period from that time to November 1930, but this effort was ineffectual due to the hurricanes of September 17, 1926, and August 8, 1928. The St. Lucie Canal was not in operation at the time of the 1926 hurricane. Except for these conditions the facilities mentioned would have permitted the calm water or quiescent fluctuation of the lake surface to have been held within a range of 3 feet. The War Department permit for construction of the original St. Lucie Canal fixed 15 feet as the minimum lake stage for regulation purposes; the controlled maximum was, therefore, 18 feet. To what extent this regulation

was applied or used prior to the hurricane of September 1926 does not appear. This hurricane washed out parts of the levee which were subsequently repaired to substantially its original state before the 1928 hurricane. In the spring of 1927, the year in which plaintiffs first began farming operations on Torry and Ritta Islands, the water level of the lake was down below the 15-foot standard for regulation because of the 1926 hurricane and the damage to the levee which had not then been fully repaired. This low level was permitted for the purpose of providing flood storage capacity during the usual fall rainy season without causing the water surface to rise to a dangerous height. However, contrary to expectations, there was an unusually small amount of rainfall. The lake rose some after August 1927; it gradually fell to an elevation of 13.8 feet in March 1928, and then further fell to 12.7 feet on May 15, 1928. The elevation of the lake was 12.9 feet on June 4 and 5, 1928. Every effort was made to conserve the water in the lake during the spring and summer of 1928 in the interests of navigation, irrigation, and fire protection. Just prior to the hurricane of August 8, 1928, the water of the lake stood at an elevation of 13.7 feet; it then rose rapidly (see finding 6). The St. Lucie Canal was opened to its full capacity at the time of the August 8, 1928, hurricane and was thereafter left wide open until the Government took over the work of improvement in 1930. Certain shoaling of the canal by the hurricane was removed after the hurricane.

16. From 1932 to 1936, covering the five-year period of construction of the levee and auxiliaries, for the months of January, February, November, and December, the monthly average calm water lake levels were below 17 feet, being at one time as low as 12.8 feet in January and February 1932.

17. In connection with this project by the United States Government, defendant's engineers evolved a formula for the regulation or control of the waters of Lake Okeechobee based on rainfall and evaporation, described herein and illustrated on a chart in evidence as plaintiffs' exhibits 5 and 6, and also illustrated on defendant's exhibit I.

Two principal controlling factors in Lake Okeechobee levels are rainfall and evaporation. Daily measurements of these two phenomena, when plotted at weekly intervals on

a graph, take the form of a curve designated by the engineers as the "R–E (Rainfall minus Evaporation) Curve," as illustrated on said graph. The rise or fall of this curve was used by defendant's engineers as the chief factor from which the rise or fall of the lake could be anticipated, and, hence, as an index to the extent to which the outlet gates should be regulated in order to maintain as near as practicable the desired lake levels of 14 to 17 feet, which represent the calm water or quiescent level of the lake.

18. Upon substantial completion of the project in 1936, defendant's engineers undertook to regulate the lake by applying the "R–E" formula, beginning in 1937.

The hurricane season is normally the late summer, and early fall, through September. Defendant's plan, in order to accomplish the object and purpose of the project, was to provide sufficient freeboard between the lake surface and the top of the levee and to hold the lake level to an elevation not exceeding 16 feet through September 1937, and after the threat of hurricanes had passed then to bring the lake level, if possible, to approximately the 17-foot level before the end of the year 1937 and to maintain that level in order to minimize fire hazards, benefit crop production, and to prevent the lake from falling below 14 feet at any subsequent time, as set forth in finding 9.

As actually regulated in 1937, the defendant's engineers opened the flood gates about August 7 to partial capacity, until the last week of September when the gates were closed, the elevation of the lake for the month of September being approximately 15.6. About that time (September 25) the lake began to rise. Since defendant expected a moderate rise at that season, the gates were kept closed until the lake reached approximately elevation 16.5 October 23. The gates were again opened on October 29, and remained open until November 20 when, the R—E curve showing a downward trend, they were closed, the defendant believing there would be no further rise. During this period, October 29 to November 20, the daily discharge was of less than full capacity.

The lake leveled off at that time for a few days, but by November 27, instead of continuing downward as defendant expected at that season, took an upward trend and again

began to rise sharply and continued to rise. The gates were opened about December 2, 1937, to full capacity, but the water continued to rise until December 4, 1937, reaching a level of 17.26 as indicated on the graph. Under the conditions existing during the year 1937, the defendant varied the strict application of the R—E formula; but this was not intentionally done. Defendant's efforts were to follow and apply the R—E formula. Under the control as it was actually exercised that year, the lake reached an elevation of 17.26 feet, its highest elevation of the 1937-38 winter season, about December 2-4. A strict application of the R—E formula would have resulted in a quiescent lake elevation of 17.04 on December 4. The gates remained open for December and January. About December 5, 1937, the water began to recede and continued down and remained down for a long period during the following year.

About December 1-4, 1937, the area was visited by a "Northwester," the wind reaching a velocity of slightly less than 30 miles per hour, causing a wind tide along the south shore of the lake and increased the lake elevation at the islands. There was also considerable rainfall north of the lake.

At hurricane gate No. 3, near Lake Harbor and close to Ritta Island, the Government's hourly readings of lake levels (as indicated on defendant's log in evidence as defendant's exhibit J) show that on December 2 at 10 p. m. the water was at level 18.30. At the same time records indicate the quiescent or calm water lake level to have been 17.16.

The difference between the level at gate No. 3 of 18.30 and the actual calm water lake level of 17.16, or 1.14 feet, was due to wind tide resulting from the action of the water with a wind velocity of 29 to 30 miles per hour in this landlocked lake blowing across the lake from the north to the south.

The Creech property is approximately one mile from the south shore and gate No. 3, and the elevation of the water at the Creech property was approximately 18.30 on December 2.

Similarly, the gate reading at gate No. 4, near Torry Island on December 2, 1937, was 18.25, while the lake level was 17.16, or a difference between the lake level and gate reading of 1.09 wind tide feet. This is estimated by defendant's

engineers to have caused a lake level at Torry Island of approximately 18.25 on December 2, 1937.

19. Some weeks prior to December 1, 1937, plaintiffs and others interested in the crops on the islands had contacted the defendant's officials in Clewiston and at Jacksonville, and had urged that the flood gates be opened and the water discharged on account of danger to their crops which had been planted and were growing.

20. During the period December 2–4, 1937, with a lake level of approximately 17.26 feet and wind tide of approximately 1.14 feet, resulting from a wind of about 30 miles' velocity, with the lake elevation approximately 18.30 feet at Ritta Island, and approximately 18.25 elevation at Torry Island, the lake waters overflowed the lands of plaintiffs Creech, Thomas, and Shore Acres Plantation on Ritta and Torry Islands and damaged or destroyed the crops then growing thereon.

21. In choosing a site for the proposed levee, four alternative locations were considered, one of which contemplated constructing it out in the lake beyond Ritta, Torry, and Kreamer Islands so as to place them all within the protection of the levee; two of which contemplated placing Kreamer and Torry Islands within the protection of the levee but leaving Ritta Island in its normally exposed position and unprotected; and the other of which followed the south rim of the lake and provided no levee protection for Ritta, Kreamer, and Torry Islands. A drawing illustrating these proposed localities is in evidence as defendant's exhibit BB.

After careful consideration and study of all the factors involved, the three locations which would have afforded some protection to one or more of the islands were rejected as being too exposed to the waters of the lake and wave action, as well as being too costly to construct and maintain in proportion to the benefits accruing therefrom. The Chief of Engineers recommended to Congress, and authorization and appropriations were made by Congress for, the site which followed in general the south shore of the lake, the final location line to be determined by the Chief of Engineers. As actually constructed, the levee followed a line along the south shore of the lake at a distance of approximately one mile from the

south end of Ritta Island and was separated from Torry Island by a navigation channel 200 to 300 feet in width and some 10 to 12 feet in depth, depending upon the lake level. The site chosen for the levee was fair, reasonable, and practicable.

22. The levee as located and constructed by the Government had no appreciable effect on the height of the waters of the lake or on the wind tides at either Ritta or Torry Islands over and above the Lake elevations and wind tides at and around the Islands which normally would have been occasioned under the same weather conditions without the levee, or if the levee had been constructed on the site of the existing state levee (see findings Nos. 5, 11, and 12).

23. During the season 1937–38, plaintiff Robert Y. Creech was farming a tract of land on Ritta Island which was planted to two crops, viz., string beans and eggplant, and plaintiff Charles E. Thomas was farming an adjoining tract on Ritta Island on which he had planted string beans, lima beans, tomatoes, eggplant, and peppers. Plaintiff Shore Acres Plantation Company in the same season was farming a tract of land on Torry Island on which a single crop, viz., Irish potatoes, had been planted.

Plaintiffs were informed and experienced farmers.

24. The land elevation on Ritta Island in 1937 varied from 16.5 to 18 feet, with the greater number of acres at elevation 17+. The tract farmed by Shore Acres Plantation Company on Torry Island in 1937 varied from 16.4 to 18.3 feet elevation. The soil on the islands being pervious was saturated with water to an elevation corresponding with that of the water in the lake. If this saturated soil is too close to the surface of the land, crops cannot be successfully grown on it. Crops generally require the water depth to be 1½ to 3 feet below the land surface.

25. In 1930 to 1932 plaintiff Creech had a series of ditches dug across his property and also subsurface drainage called moles, connecting the ditches and allowing the water to go to a common level. He installed two power pumps and erected mud dikes which were pervious from elevation 16.5 to a point on the land where the elevation was approximately 18 feet.

Before 1937 Mr. Creech grew crops with splendid success when the water elevation at Ritta Island was at 16 to 16½ foot level. As the water elevation approached 17 feet, the waters had access to portions of his land and he was, with his then equipment, unable to grow crops with the same degree of success as when the waters were at a lower level. At such times only on the high elevations of his land could crops be grown, and he suffered losses.

In 1937 plaintiff Creech's protective equipment was inadequate to successfully grow crops with the lake elevation of 17 feet plus normal and expected wind tides.

26. The land of plaintiff C. E. Thomas on Ritta Island had no dike construction and there is no evidence that he had any ditches or had installed pumps. At several points where there were elevations of less than 17 feet in 1937, lake waters of that elevation would flow onto the land and to a greater extent with wind tides. At the time of the flood in question in 1937, the water entered the Creech tract from the Thomas tract at about the same time it overtopped Creech's dikes.

Owing to his lack of protective equipment, Mr. Thomas could not grow crops as successfully as Mr. Creech. When the water elevation, including wind tides remained well below 17 feet, crops were successfully grown, but his degree of success lessened as the water level approached elevation 17.

27. The tract of Shore Acres Plantation Company on Torry Island had two small ditches dug at the south and southeast portions of the tract along the border of the navigation or rim canal, and the spoil from these ditches was thrown up alongside to form a dike for the protection of the crops from lake waters. This spoil dike was wholly inadequate for the protection of the farming operations of plaintiff. Portions of the land were protected to some extent by the natural elevations of the land.

Plaintiff was not able to successfully grow full crops on the Torry Island land with lake levels plus wind tide of 17 feet. At the 17-foot level plaintiff could cultivate and grow crops only on the higher portions of the land.

28. Plaintiffs commenced farming operations on Ritta and Torry Islands in 1927. During the years prior to 1937,

when the recorded mean monthly lake stages or the average daily lake stages during the months of January, February, November, and December had not been above elevation of 17 feet (see finding 14), plaintiffs enjoyed the advantage of low lake elevations for their farming operations, and they were often able to produce full crops successfully, although at times they experienced damage and losses due to high water as well as from cold weather.

29. None of the plaintiffs had adequate equipment in 1937 to protect their crops from loss or damage with a lake level of 17 feet plus normal, expected wind tides. Since 1937 the Creech and Thomas tracts on Ritta Island have been completely enclosed by dikes which afford adequate protection to their lands under normal conditions on the lake.

30. The fall and winter seasons in the vicinity of Lake Okeechobee, that is, the months of October, November, December, January, and February, are particularly adaptable to vegetable farming, and that area supplies to a great extent the winter green vegetable market in the more northerly latitudes, particularly along the eastern seaboard of the United States.

31. In the season of 1937–38 Creech commenced planting in October. In that season some farmers on the islands had not yet planted their crops when the overflow occurred in early December 1937. Plaintiff Creech planted his land on Ritta Island that season to beans and eggplant at intervals between October and the last of November so that the beans which ordinarily mature in 6 to 8 weeks could be marketed at intervals from late December through January and February. The eggplant being a longer crop would have been harvested in March. The last 20 acres of Creech's tract were planted late in November, just prior to the overflow of his land in early December. The tract contained a total of 122.5 acres and was planted with two crops growing at the same time, as is not unusual in the rich everglade soil, as follows: eight rows of beans, three rows of eggplant, and one row of corn, the latter being used as a windbreak to protect the other plants.

Robert Y. Creech—No. 44729

32. Robert Y. Creech had planted and growing on the lands described in the amended petition herein:

35 acres of eggplant of the value of	$11, 411.40
110 acres of beans of the value of	16, 104. 00
	27, 515. 40
Less approximate amount salvaged	995. 00
Net loss	26, 520. 40

C. A. Thomas and Inman W. Weeks—No. 44730

33. Plaintiffs' decedent, Charles E. Thomas, whose land adjoins that of Creech, had planted about the same time as Mr. Creech, and had growing on the lands described in the amended petition herein:

80 acres of string beans, approximately 15 acres of which were salvaged, leaving 65 acres of the value of	$9, 516. 00
39 acres of lima beans of the value of	7, 449. 00
7 acres of eggplant of the value of	2, 282. 28
16 acres of peppers of the value of	1, 664. 00
18 acres of tomatoes of the value of	2, 772. 00
	23, 683. 28
Less cost of bringing crops to maturity	1, 127. 75
Net loss	22, 555. 53

Shore Acres Plantation, Inc.—No. 44731

34. The evidence as to the potato crop of Shore Acres Plantation is unsatisfactory. This company had planted on the island about 100 acres of potatoes. A considerable amount was damaged by water, but after the waters had subsided plaintiff cultivated, sprayed, and raised a very substantial crop. Plaintiff also had planted about 60 acres of potatoes on the mainland, which crop was in part killed and the balance damaged by frost. There is no evidence as to the number of bushels harvested from the island or from the mainland but, with no separation, all were gathered at the same time, taken to Belle Glade, and marketed with the Wedgeworth Packing Company. There were sold 12,984

bushels at a gross price of $8,717.01, or net price to plaintiff of $5,543.87.

In an application for a renewal of its loan, on April 11, 1938, plaintiff represented that it had harvested 175 acres and produced 12,953 bushels of potatoes.

Plaintiff suffered some loss on account of the water covering its crop of potatoes, but the proof is unsatisfactory as to any definite amount.

The court decided that the plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The claims made by plaintiffs in the petitions filed, for loss and damage to their crops in December 1937, are that during each winter season the area in question is usually and normally visited by one or more periods in which the wind blows over Lake Okeechobee from the North or Northwest at the rate of 20 to 35 miles per hour, or more, causing slight wind tides along the Southern border of the lake varying with the height of the lake and the intensity of the wind; that prior to the construction of the levee by the defendant, and at the high stages of the lake, these wind tides were dissipated after a rise of a few inches by spreading out to the old dike, and through the openings in it, and by enormous leakage through and under it, but that after the construction of said levee by defendant and the closing of the outlet channels on and after the early part of 1937, these tides, at high stages, were abruptly intercepted by the impervious levee located immediately adjacent to the lake, and rose until sufficient head was generated to produce sufficient under and lateral flow back into the body of the lake to create an equilibrium.

Further, they claim that during and prior to the winter crop season of the years 1937 and 1938 plaintiffs had provided adequate protection against a lake elevation of 17 feet, with normal wind tides as they were experienced prior to that time superadded, and had the lake elevation not exceeded 17 feet, and had the wind tides not been proportionately increased by the construction of the levee plaintiffs would not have sustained loss or damages to their crops from high water during said season.

In seeking enactment of the Special Act, quoted in finding 1, plaintiffs stated their claims to Congress in a letter of December 30, 1937, to be that "* * * the levees as established and located have left these islands wholly unprotected. * * *. Properly located levees would have furnished adequate protection not only against floods from abnormal lake stages but also floods produced by wind tides at normal stages. But we do not complain of this. What we do complain of is the flood conditions produced by the levees in their present location. * * *. Naturally the inquiry arises as to the manner in which these levees have caused this changed condition. * * *. Before the advent of the levees wind tides would sweep on past the islands and spend themselves into these bays, pockets and marshes [lakeward of the old levee] without flooding the islands. Now the levees have cut off all of these bays, pockets and other natural outlets for wind tides. The levees stand between the shore line and the islands skirting close to the south line of Torry and Ritta Islands. One very large bay (Pelican Bay) is completely cut off."

In a further written statement filed with Congress January 14, 1938, in reply to a statement filed by the Secretary of War, plaintiffs stated with reference to their claims that "In our letter of December 30, in which the gravamen of our complaint is set forth, not one word of criticism will be found with reference to the lake elevation. Neither is there any complaint that the levees have in any manner whatsoever interfered with or prevented the control of the lake levels. * * *. Our claims for damages are predicated on the position that by virtue of its location, and other natural conditions surrounding the vicinity in question, the levee causes wind tides to bank up against it, thereby flooding the islands. In short, before the advent of the levees wind tides swept on past the islands and dissipated themselves in bays, pockets, and other natural outlets and flood conditions were not produced. Now these wind tides are impounded close to the islands, producing floods followed by enormous crop damage."

Plaintiffs press the same contentions, as set forth above, in these cases as the basis of their right to recover. In favor-

ably reporting on the enactment of the Special Act the Claims Committees of Congress (House Report 2541, 75th Cong., 3d sess., p. 3, and Senate Report 2097, p. 3) stated, in part, that "The record is clear that wind tides and not the water level of the lake cause this [damage], * * *. Certainly they are entitled to a determination of their claims in a competent court. The facts establish more than a *prima facie* case but whether the Government, as a matter of law or equity, has caused the losses to claimants and ought to respond in damages therefor, is a question which we do not feel within our province to decide, particularly since we have not been called upon to do so."

From the facts established by the greater weight of the evidence of record, and set forth in the findings, we are of opinion that plaintiffs are not entitled to recover either under the Fifth Amendment or the Special Jurisdictional Act. There was no taking or intention to take plaintiffs' lands or a permanent easement thereon, i. e., the right to flood the lands during the winter months, which is a part of the season for raising crops thereon. The act of July 3, 1930, authorizing the improvements, provided "That no expense shall be incurred by the United States for the acquirement of any lands necessary for the purpose of this improvement." In addition the record shows that it was the purpose and intention of the Government to regulate the waters of Lake Okeechobee as far as possible so as to prevent the water from rising above the maximum calm water elevation of 17 feet at any time, which elevation was considerably lower than the calm water elevation which the water had customarily reached in years prior to the improvement (findings 13 and 14). In 1937, the year in question, the Government used its best efforts to regulate the water level on the basis of the formula prepared from past and existing facts and data; in this it succeeded, and the calm water level did not rise above elevation 17.26 in the winter months of 1937. Plaintiffs suffered loss and damage to their crops in prior years from high water and wind tides. To what extent the record does not show. They claim their crops were not entirely destroyed in prior years.

On the question whether there was a taking under such circumstances as to give rise to an implied contract to pay

just compensation under the Fifth Amendment, it must be held on the facts that whatever damage plaintiffs sustained as a result of the Government work was consequential and the result of authorized action of the Government in connection with navigation and flood control, for which no remedy is afforded in the courts under the Fifth Amendment. *Gibson* v. *United States*, 166 U. S. 269; *Sanguinetti* v. *United States*, 264 U. S. 146; *Matthews, Trustee for R. W. Owen et al.*, v. *United States*, 87 C. Cls. 663, 720, 721; *Poinsett Lumber and Manufacturing Company et al.*, v. *United States*, 91 C. Cls. 264, 266.

Under the Special Act of June 25, 1938 (finding 1), as we interpret it, plaintiffs have not established a right to recover from the Government the damages sustained by them. This act had a purpose, and its history and language indicate that such purpose was to confer jurisdiction and authority upon the court to render judgment for the amount of damage to or loss of crops if it should be established by proof that such damage or loss in fact and in law "resulted from the construction of levees * * * and high waters caused thereby." In other words, the damages which may be allowed are to be determined according to the usual principles of legal cause and legal liability. The act does not concede liability, and plaintiffs do not so contend.

Plaintiffs, as we understand their position in these cases, do not base any part of their claim on the fact that the maximum calm water lake elevation at the time of the damage was 17 or 17.26 feet; they base their claimed right to recover on the asserted facts that they had provided adequate equipment to protect their crops against damage from wind tides at a water elevation of 17 feet, which they expected; that the flooding which occurred as a result of the 30-mile per hour northwest wind would not have occurred had the Government levee not been constructed, or if it had been constructed on the site of the old levee, and that the location of the Government levee on the lake shoreline near the islands caused this wind tide to be "six or more inches higher than before the levee was built," and that this was the cause of the loss.

These contentions present questions of fact. The entire record has been carefully studied and considered in the light

of plaintiffs' exceptions and arguments, and from the oral and documentary evidence we have found that these contentions are not sustained, and that, on the contrary, the greater weight of the evidence establishes the facts that the levee, as located and constructed by the Government, had no appreciable effect on the height of the waters of the lake or on the wind tides at either Ritta or Torry Islands over and above the elevations which normally would have been occasioned under the same weather conditions without the levee (finding 22), and that none of the plaintiffs had adequate equipment in 1937 to protect their crops from loss or damage with a lake elevation of 17 feet, plus normal expected wind tides.

Plaintiffs are therefore not entitled to recover, and the petitions are dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE LACCHI CONSTRUCTION COMPANY, INCORPORATED, v. THE UNITED STATES

[No. 44844. Decided October 2, 1944. Plaintiff's motion for new trial overruled January 8, 1945]

On the Proofs

Government contract; misrepresentation; failure to protest or appeal; extra work; liquidated damages.—Upon the Commissioner's report of the facts and a careful study of the evidence, it is *held* that there was no misrepresentation by the defendant as to subsurface conditions existing at the site of the cofferdam erected by plaintiff in connection with the work undertaken by plaintiff under the provisions of the contract in suit, and plaintiff is not entitled to recover.

Same; failure to protest or appeal.—Where plaintiff did not protest nor appeal when plaintiff considered that it was being required to furnish plant or equipment not required by the contract in connection with extra work, there can be no recovery under the express provisions of the contract. Cf. *Seeds & Durham* v. *United States*, 92 C. Cls. 97.

Same; contracting officer's decision.—The contracting officer's decision not to make any allowance for rental of cofferdam was not erroneous.

Same; quantum meruit.—Recovery on an implied contract cannot be had where there is an express contract concerning the subject matter, as there was in the instant case.

Same; extra work not disapproved by contracting officer.—Where plaintiff, under written instructions from the contracting officer, undertook extra work, a daily record of which was made by defendant's engineer, signed by plaintiff and defendant's engineer and reported each day to the contracting officer, who at no time made any adverse decision with reference thereto; it is *held* that plaintiff is entitled to recover.

Same.—Where under the provisions of the contract plaintiff agreed not only to furnish all concrete but to perform all work necessary to its completed state on the concrete portion of the structure, this included not only the pouring of concrete but the erection of such extra concrete sections or footings as might be found necessary, and plaintiff is not entitled to recover for the cost of concrete forms for this extra concrete as for extra work.

Same; liquidated damages; overhead expense.—Plaintiff is entitled to recover $300 for 12 days' delay erroneously deducted as liquidated damages by the Comptroller General (claim 8) and $616 as damages for overhead expense resulting from delay caused by the defendant, (claim 9).

The Reporter's statement of the case:

Mr. Prentice E. Edrington for plaintiff.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff seeks to recover a total of $29,256.22 on nine items making up its claim, which is based on damages for breach of contract arising from alleged misrepresentations, delay, and extra work.

Defendant denies that it is liable on any of the items of the claim.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Maryland corporation with its office in Baltimore.

2. July 15, 1933, it entered into a contract with the United States, by J. D. Arthur, Jr., Major, Corps of Engineers, as contracting officer, to furnish all labor and materials, and to perform all work required for the construction of the Booster Pumping Plant Buildings for the Washington

Aqueduct, Washington, D. C., for the consideration of $32,797, in strict accordance with the specifications, schedules, and drawings.

Part of Article 1 of the contract reads as follows:

> The work shall be commenced within 20 calendar days after date of receipt of notice to proceed and shall be completed within 120 calendar days after date of receipt of notice to proceed.
>
> Extra work shall be performed on the following basis: For extra earth excavation, thirty cents (0.30) per cubic yard; for extra rock excavation, Five Dollars ($5.00) per cubic yard; for extra concrete in place, Nine Dollars ($9.00) per cubic yard; for extra reinforcing steel in place, three and one-half cents (0.035) per pound.

Plaintiff's bid, which was made on a form furnished by the Government, contained the following immediately after the statement by plaintiff of its lump-sum bid of $32,797.00:

See par. No.	Quantities for canvassing bids	Unit	Description	Unit price	Amount
2-04	300	Cu. yds	Extra earth excavation	$0.30	$90.00
2-04	50	Cu. yds	Extra rock excavation	5.00	250.00
4-16	50	Cu. yds	Extra concrete in place	9.00	450.00
4-17-g	3,000	Lbs	Extra reinforcing steel in place	.035	105.00

Only the figures under "Unit Price" and "Amount" were filled in by plaintiff. The figures in the first column, "See Par. No.," refer to paragraphs of the specifications. The figures in the second column, "Quantities for canvassing bids," were not intended to represent a statement of the actual amount of extra work or material that might be required, but were used only for the purpose of canvassing or the evaluation of bids of unit prices. This was clear from the provisions of the specifications referred to. Plaintiff had no reason to believe that the unit prices bid would not apply if more than the quantities mentioned in the bid form were found necessary during the course of the work. The express provisions of the specifications hereinafter quoted and Art. 1 of the contract, quoted above, subsequently executed were to the contrary.

3. The Booster Plumping Plant was designed by the defendant to serve as a dam across Dalecarlia Reservoir at its narrowest point by the construction of a Booster Pumping Station Building, with wing walls and projecting wing dams at each end connecting with the north and south shores of the reservoir. By means of pumping machinery connected to suction and discharge bells installed later by defendant in the building to be constructed by plaintiff, water from the upper or western area of the reservoir could be transferred to the lower or eastern section, permitting the water level in the lower basin to be raised 3 feet, thereby increasing the water pressure in the water mains serving the District of Columbia.

4. The work to be done under the contract was described in Paragraph 2 of the specifications, as follows:

> (a) Construction of a complete Booster Pumping Station, with wing walls, including the installation of two complete 5′ 0″ x 5′ 0″ sluice gates with stems, stands, and accessories. The sluice gates and all necessary bolts and accessories will be furnished and delivered by the United States.
>
> (b) Construction of an earth-fill dam with a sheet pile core.
>
> (c) Construction of a complete superstructure for a control house upon a concrete substructure constructed by the United States.

The specifications provided further that the work was to conform to four drawings shown on Sheet 1, Dam and Wing Walls; Sheet 2, Substructure; Sheet 3, Superstructure; Sheet 4, Control House.

5. Sheets 1 to 4, inclusive, referred to in the preceding finding are the contract drawings, and are respectively plaintiff's exhibits 8–A, 8–B, 8–C, and 8–D. The Control House, shown on sheet 4, plaintiff's exhibit 8–D, is not involved in this litigation.

The invitation for bids with instructions to bidders (plaintiff's exhibit 3), the specifications, and contract drawings, heretofore referred to, were issued by defendant on June 7, 1933, calling for bids to be submitted on July 6, 1933. Plaintiff obtained from defendant the standard Government

instructions to bidders and the contract drawings on June 14, and submitted its bid on July 6, 1933.

6. Paragraph 3 of the specifications provided in part as follows:

> The work shall also conform to such other drawings relating thereto as may be exhibited in the office of the contracting officer prior to the opening of proposals, and to such drawings in explanation of details or minor modifications as may be furnished from time to time during construction, * * *. All of those drawings will form a part of these specifications.

Prior to submitting its bid plaintiff visited the office of the contracting officer to examine the drawings referred to in the paragraph just quoted. Defendant there exhibited to plaintiff a drawing dated July 1932 (plaintiff's exhibit 5). This was a probe drawing or chart prepared by defendant from field notes made by the probing party from the Rivers and Harbors Section of the District Engineer's Office, and used by defendant's engineer and the contracting officer as the basis of the contract drawings and specifications. This probe drawing shows the results of a probing survey during July 1932 of that area of the Dalecarlia Reservoir at the site of the work. The data shown on this exhibit was secured by a crew of surveyors by driving hand probes and jet probes to points of resistance. The jet probings are shown on the exhibit as black dots, and the hand probings are shown as small circles. The normal water level is shown on the exhibit as elevation 144.0; the elevation of the top of the mud is shown as approximately 137.5; and the elevation of the top of the rock is shown as approximately 123.6. The elevations of mud and rock shown on the contract drawings were taken from this exhibit.

The drawing was entitled "Probings at site of proposed 'Booster Dam'" and showed the points of probings over the site, the elevations at which hand probings had been made to resistance and elevations of jet probings to resistance at which rock was encountered. It contained the following "Note":

Contours on top of rock as determined by jet probings (dot) and hand probings (circle).
137.5 Elev. top of mud.
123.6 Elev. top of rock.

On a section of the drawing the water level was shown by a dotted line at elevation 144.0; an irregular line between elevations 135 and 140 indicated the mud level, and another irregular line between elevations appróximately 123 and 133 was indicated as "rock."

7. The invitation for bids which was given to prospective bidders, and to which was attached the specifications, stated as follows:

> INVESTIGATION OF CONDITIONS.—It is expected that bidders will visit the site and acquaint themselves with all available information concerning local conditions having a bearing on transportation facilities and the handling and storage of materials, and the difficulties which may be encountered during the execution of the work. Failure to acquaint himself with all available information concerning these conditions will not relieve the successful bidder of his responsibility for estimating the difficulties entering into and the costs of performing the complete work as required.

Plaintiff's officers did view the site to acquaint themselves with local conditions but did not make extensive probings. The time allowed between the invitation for bids and the date fixed for the opening thereof was not sufficient to enable bidders to make extensive probings or borings to determine the exact nature of "rock" indicated on defendant's probe drawing. In making its bid plaintiff assumed that the indication of "rock" on the probe drawing meant continuous "bed rock" or "solid rock" over the entire area of the project.

There was no information relative to the subsurface conditions below the mud line at the site in the possession of either the defendant or the plaintiff, other than that disclosed on the probe chart. Defendant did not misrepresent the subsurface conditions at the site, as disclosed by the probings which it made.

The contract drawings for construction of the foundations and the building were prepared on the basis of the information obtained by the probings and the provisions of the standard form of construction contract and the specifications relative to changes, extra work, and unforeseen subsurface conditions. The contract drawings indicated the elevations of the foundation footings as "Approx. top of rock," and the elevations so shown were approximately the elevations at which "rock" had been encountered by the probings hereinbefore mentioned.

Paragraph 2–02 of the specifications provided that "The material to be removed within the cofferdam is believed to be mud, earth and a small amount of rock, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly." This had reference to the material down to the approximate elevations shown on the contract drawings. Paragraph 2–04 of the specifications provided that "Should the material in the bottom of the excavation [as shown on drawings] be found unsuitable for the foundation of the structure to be built thereon, the contractor shall continue the excavation to such depth as the contracting officer may require. The additional excavation below the grades shown on the drawings will be paid for at the contract unit price per cubic yard for Extra Excavation." Paragraph 2–07 provided that "It is the intention of the contracting officer to support all concrete work on rock, as shown on the contract drawings, or as may be required during the progress of the work. All rock surfaces for foundations shall be free from loose pieces and shall be worked down to a firm solid bed of suitable form satisfactory to the contracting officer."

8. Plaintiff received notice to commence work on August 5, 1933, which made the contract completion date December 3, 1933. For reasons hereinafter shown the contract was not completed until October 25, 1934, which was 446 days after the notice to commence work, or 326 days after the contract completion date.

9. In order to carry out the contract plaintiff was required to construct a cofferdam 104 feet long north and south and 64 feet wide. The pumping plant to be constructed was

76 feet long and 22 feet wide. Plaintiff, for the purpose of constructing the cofferdam and for the purpose of performing subsequent work, first constructed a trestle along the north and south center line of the dam on which to operate its crane to put in the cofferdam composed of interlocking steel sheet piling and to make the necessary excavations after the cofferdam was completed. By September 2, 1933, the steel sheet piling of the cofferdam had been driven and two rings of bracing had been installed. September 7, 1933, the northeast part of the dam collapsed.

By October 24, 1933, the dam had been reconstructed to the same stage as it was on September 7th. By November 14, 1933, two additional inside rings of bracing had been installed.

10. By probings made within the cofferdam about November 17, 1933, after most of the work of earth excavation had been done, it was discovered that the solid rock line suitable for foundations was about 13 feet lower than shown on the contract drawings. As the foundation of the booster pumping station had to be built on solid rock, that involved extra work not within the contract terms. November 28, 1933, the contracting officer issued to plaintiff Extra Work Order No. 1 after negotiations and a written proposal by plaintiff. This order will be more fully referred to hereinafter. This order provided that "boulders, sand, gravel, earth, and rock below footing elevations shown on contract drawings shall be removed until bedrock is reached, and extra concrete and reinforcing steel shall be placed as directed by the contracting officer." This extra work, below the rock line elevations shown on the contract drawings, was to be done by plaintiff on the basis of cost plus 10 percent. Work was commenced on Extra Work Order No. 1 December 1, 1933, and was completed on May 2, 1934, a period of 152 days. When the foundation under Work Order No. 1 was completed on the last named date, plaintiff resumed the work under the contract.

11. November 28 and December 27, 1933, plaintiff wrote the contracting officer letters in which it asked for an extension of time of 60 days to restore the dam after its collapse

on September 7. January 4, 1934, the contracting officer wrote plaintiff as follows:

> With reference to your letter of December 27, I am unable to grant the extension of 60 days requested by you. The Comptroller General of the United States decided that in all contracts involving a liquidated damage clause that the contracting officer must make the deductions required by the specifications, and he is left no judgment in the matter. However, the contractor is permitted to submit a claim for the remission of these damages giving his reasons for making such a request. I suggest that this be taken up at the completion of your contract.

January 13, 1934, the plaintiff again wrote a letter to the contracting officer requesting an extension of time from September 7 to December 1, 1933, on account of the collapse of the dam. The contracting officer did not answer this letter.

12. On installment payments made to plaintiff July 25, August 31, October 17, and October 25, 1934, deductions were made for liquidated damages to which plaintiff duly protested. November 9, 1934, after all work had been completed and accepted plaintiff submitted 16 claims to the contracting officer. Except as hereinafter stated, the contracting officer sent no finding or decision as to any of these claims to plaintiff. These claims were referred by the contracting officer to the Comptroller General with his recommendations. The decision of the Comptroller General, dated June 5, 1935, was sent to and received by plaintiff. Before the claims were submitted to the contracting officer, plaintiff had been paid the contract price less $4,050 liquidated damages for 162 days withheld on the partial payment dates above named. On the 16 claims aggregating $32,301.56, the Comptroller General allowed $1,499.09 and reduced the liquidated damages 5 days or $125. Plaintiff protested the decision of the Comptroller General. Plaintiff cashed the check of $1,624.09 ($1,499.09+$125) with the understanding that it would be without prejudice to the further prosecution of its claims.

13. Plaintiff's work on the Booster Pumping Plant Building may be divided into four periods:

1st. From August 5 to September 7, 1933, the date the cofferdam collapsed. During this period plaintiff constructed the trestle on which to operate the crane, installed the cofferdam with two rings of bracing, did some excavating, and was preparing to install the third ring of bracing.

2nd. From September 8 to November 30, 1933. During this period plaintiff reconstructed the collapsed cofferdam with four rings of bracing 4 to 6 feet apart, and excavated to the level of the rock line as shown on the contract drawings.

3rd. From December 1, 1933, to May 2, 1934, when plaintiff was working under Extra Work Order No. 1 on the basis of cost plus 10 percent and certain unit prices. During this period plaintiff excavated to solid rock about 13 feet below the rock line shown on the contract drawings, and built the concrete foundation from solid rock up to the rock line shown on the original contract drawings.

4th. From May 3, 1934, when plaintiff resumed work under the contract, to October 25, 1934, the date the contract was completed. During this period plaintiff built the concrete substructure, the brick superstructure, and completed the contract.

14. Plaintiff in its petition sets out ten separate claims. One has been abandoned. These nine claims were included in the sixteen claims submitted to the contracting officer on November 9, 1934, referred to in finding 13.

CLAIM 1. COST OF REPAIR OF COFFERDAM AS RESULT OF COLLAPSE ON SEPTEMBER 7, 1933

15. Paragraphs 1–01 and 1–02 of the specifications provided as follows:

> 1–01. EXTENT OF WORK.—All excavation and concrete work for the Booster Pumping Plant substructure shall be done within a cofferdam built to give sufficient space for excavation for the structure. The exact size, type, and location of the cofferdam will be left to the judgment of the contractor and it is expressly understood that he will be solely responsible for the work. The required waterway through the reservoir adjacent to the cofferdam shall be such that there will be no loss of

head in the water levels above and below the cofferdam.

1-02. TYPE.—The cofferdam must have stability equal to that of the box type in which the base width of any section of cofferdam shall be at least equal to its height. The top shall be at elevation 148.0. After award of the contract the contractor shall submit for approval of the contracting officer, prints in duplicate, showing detailed plans of the cofferdam he proposes to build, before making any provision for its construction, but approval of such plans shall not relieve the contractor in any way of the responsibility for its strength and adequacy.

16. Plaintiff prepared a drawing of the cofferdam it proposed to build and submitted it to the contracting officer. July 21, 1933, the contracting officer wrote plaintiff, the second paragraph of which is as follows:

> The drawings are approved subject to specification requirements and such modifications as the construction beams, girders, and brackets may require, and one copy is returned herewith.

The cofferdam plan drawing was purely schematic and was not intended to show the details of the cofferdam construction. This drawing showed only the upper or first ring of bracing. Plaintiff intended to install a second ring of bracing, or more, as field conditions required.

17. The cofferdam was 104 feet long north and south and 64 feet wide. Plaintiff first built a trestle which ran along the north and south axis of the dam. After the trestle was built plaintiff drove guide piles around the perimeter of the dam and on the outside of the guide piles were bolted 12″ x 12″ wales at about the water level. The interlocking steel sheet piles were then driven partially around the perimeter of the dam immediately outside of the wales. When this was completed the steel sheet piles were driven to refusal. The driving of the wooden guide piles and interlocking steel sheet piling was done with a steam hammer on a crane mounted on a caterpillar tractor which was operated on a runway over the trestle. September 2, 1933, the steel piling was completely driven and two rings of bracing installed. The second ring of bracing was 6 feet below the first ring and approximately at the mud line.

18. The first ring of bracing was completed August 21, and the second ring of bracing on September 2, 1933, after considerable excavation work had been done in the northeast corner of the cofferdam. September 6, 1933, plaintiff began to install a third ring of bracing about 6 feet below the second ring, but no portion of this additional bracing work was done to strengthen the northeast corner of the cofferdam. On the morning of September 6 the steel sheet piling at the northeast corner of the cofferdam had deflected, or was bent in four and one-half inches, due to the excavation and insufficient bracing. Defendant called this condition to the attention of plaintiff.

19. On the morning of September 7, 1933, the steel sheet piling in the northeast corner of the cofferdam, near wooden guide pile 7B, was bulging or bending inward six inches. The bottom and top of the steel sheet piling were firm, but the bulging or "belly" was in the midportion of the steel piles. This showed that there was serious danger that the dam would collapse.

20. When the dam collapsed at 2:05 p. m., September 7, the bracing timbers buckled at the scabbed joints and heaved into the air, and the steel sheet piling in the vicinity of wooden guide pile 7B moved inward ten or twelve feet and the bottom of the steel sheet piles skidded inward.

The collapse of the cofferdam started at guide pile 7B. After collapse of the dam this pile was pulled out and it was found to have been sheared diagonally across the lower seven feet. Guide pile 7B was sheared, or cut in two pieces diagonally, when the steel sheet piling was driven, and this was one reason why the dam collapsed.

21. From September 8 to September 11, 1933, plaintiff did work preliminary to rebuilding the cofferdam. September 12, plaintiff started reconstructing the dam. The first ring of bracing was finished on September 22, 1933. In order to make more secure the toe of the steel sheet piling on the north end of the dam plaintiff drilled 29 holes to an average of 15 feet below the rock line shown on the contract drawings. In these holes plaintiff placed 6-inch pipes within which were placed 15-foot sections of railroad rails and grouting, which added to the resistance strength of the

sheet piling on the north end of the dam. The location of the pipe and rail bracings at the north end of the dam is shown as red dots on plaintiff's exhibit 17.

22. Plaintiff finished reconstructing the second ring of bracing October 21, 1933. The first and second rings of bracing as reconstructed were an improvement on the first and second rings as installed before the collapse. Defendant's exhibit 5 shows the first ring of bracing before the collapse and defendant's exhibit 7 shows the first ring of bracing after the collapse. Defendant's exhibit 6 shows the second ring of bracing before the collapse and defendant's exhibit 8 shows the second ring of bracing after the collapse. On October 24, 1933, the cofferdam reconstruction had reached the same stage as it was just before it collapsed on September 7, 1933.

23. November 2, 1933, the third ring of bracing was completed and on November 14, 1933, the fourth ring of bracing 4 or 5 feet below the third ring was completed.

24. By probings made by defendant on and after November 17, 1933, it was learned after much of the material to the "rock line" had been excavated, that the solid bed rock was about 13 feet below the "rock" line shown on the contract drawings. By excavations over the entire area completed before November 30, 1933, to the rock line shown on the contract drawings it was ascertained that instead of solid rock necessary for the foundation footings for the pumping plant there were loose rock, boulders, sand, gravel, mud, etc. Prior to these probings in the latter part of November 1933, the only knowledge of conditions was as shown on the contract drawings and the probe chart. The above-mentioned discovery of the true conditions at the rock line indicated on drawings, gave rise to plaintiff's claim that the cause of the collapse of the cofferdam on September 7, 1933, was attributable to misinformation given on the probe drawing and the contract drawings.

25. Plaintiff's contention to the contracting officer November 28, 1933, and afterwards, as to the cause of the collapse of the cofferdam was that if solid rock had been where indicated on the contract drawings the toe of the steel sheet piling in the driving process would have notched itself into

the rock, which would have prevented it from being dislodged or pushed inward, and with the earth berm within the cofferdam next to the piling the contract work could have been carried to any depth without endangering the stability of the cofferdam.

26. After consideration of all the facts relative to the collapse of the cofferdam, known and obtained at the time, and, also, plaintiff's contentions as to the cause of the collapse of the cofferdam, the contracting officer found and advised plaintiff on Decembr 5, 1933, of his decision with respect thereto as follows:

> In my opinion the failure of your first cofferdam was entirely preventable and occurred because of the failure to take the ordinary precautions in this class of work. As you are well aware the failure occurred not because of any movement of water on the end of the piling but because of insufficient bracing inside the cofferdam proper.

27. The dam collapsed by reason of plaintiff's failure to construct a proper internal bracing system, which failed when excavation was carried too deep in the northeast corner without adequate bracing of the steel sheet piling.

28. It cannot be found as a fact from the evidence that if the subsurface conditions which plaintiff expected to find had existed the cofferdam, as constructed and braced and with the excavation as made, would not have collapsed.

The cofferdam did not meet the requirements of paragraph 1–02 of the specifications (finding 15). It did not "have stability equal to that of the box type."

29. Between September 7, when the dam collapsed, and October 24, 1933, when the dam had reached the same stage of construction as of September 7, 1933, plaintiff expended on labor and material in the reconstruction of the dam the sum of $6,068.72.

Plaintiff claims this amount plus a 10 percent profit of $606.87.

CLAIM 2. FOR $7,600 AS RENTAL VALUE OF COFFERDAM DURING PERIOD FROM DECEMBER 1, 1933, TO MAY 2, 1934, PLUS PROFIT OF $760

30. The work under Extra Work Order No. 1, referred to

in finding 10, was done within, and with the use of, the cofferdam from December 1, 1933, to May 2, 1934. When in November 1933 it was found that solid bed rock on which to construct the Booster Pumping Plant would not be encountered at the elevations shown on the contract drawings it was conceded that the extra work of excavating to solid rock and of constructing a concrete foundation up to the rock line shown on the contract drawings was not within the original contract terms.

31. The contract contained the standard Art. 3 relating to changes, and Art. 4 relating to changed or unforeseen subsurface conditions.

Paragraph 8, of the specifications entitled "Extra Work," provided as follows:

> (a) For any extra work ordered in writing by the contracting officer which is not otherwise included in the contract, and for which no basis of measurement or payment is provided elsewhere in these specifications, the contractor shall furnish materials and labor on the basis of actual cost to the contractor plus a commission of 10 percent to cover supervision and use of tools, the rates for labor not to exceed those prevailing in the immediate vicinity for labor of equal skill.
>
> (b) The actual cost of extra work above specified shall include the cost to the contractor of necessary labor and materials employed on or incorporated into the work, together with the cost of insurance of employees, and the public where such insurance is carried, and such allowance for the use of any plant or machinery actively employed on this extra work as may be determined by the contracting officer, but such actual cost shall not include the use of tools, general superintendence, office accounting, engineering expenses, allowances, or percentages for collateral or estimated costs, or any profit, all of which shall be deemed to be and shall be included in and covered by the above specified allowance of 10 percent.
>
> (c) The unit prices to be charged for such labor, materials, plant and machinery as will be required in the execution of this additional work, shall be submitted by the contractor and approved in writing by the contracting officer before such additional work is commenced. The contracting officer may at his discretion

furnish any materials or supplies required for the extra work, and the contractor shall not be entitled to any allowance or percentage on account of materials and supplies so furnished.

32. November 23, 1933, the contracting officer wrote plaintiff as follows:

> In accordance with paragraph 8 of the specifications for the construction of the booster pumping plant building, you are directed to remove such material as is located below the elevations shown on the contract drawings until hard rock is reached. This office will supply the steel sheet piling needed for shoring purposes. For this extra work, for which no basis of payment is provided in the specifications, you will be allowed actual cost plus a commission of 10% to cover supervision and use of tools.
>
> The unit prices to be charged for this labor, materials, plant, and machinery will be submitted by you and approved in writing before the additional work is commenced. At the close of each day on which extra work is performed reports shall be submitted, in duplicate, on forms which will be furnished you, showing in detail the cost and character of extra work performed on that day. These reports shall be approved by the inspector and one copy shall be retained by you.

33. November 24, 1933, plaintiff submitted to the contracting officer a schedule of unit prices (which schedule was incorporated in paragraph (1) of the Extra Work Order No. 1, hereinafter quoted) for labor, equipment "actively employed on this extra work," and material, accompanied by a letter as follows:

> We beg to acknowledge receipt of your letter of November 23rd authorizing us to proceed with excavation below excavation shown on the contract drawings on the basis of cost plus 10%.
>
> We are submitting for your approval a schedule of labor rates, together with rental rates on plant and machinery applying on this work. Before any materials are purchased prices on individual items will be submitted for your approval.
>
> Thanking you for your kind attention to this matter, we are, * * *.

November 28, 1933, the contracting officer prepared formal Extra Work Order No. 1, and on that date mailed it to plaintiff with the following letter:

> There is inclosed Extra Work Order No. 1, dated November 28, 1933, with request that it be executed in triplicate and all three copies returned to this office. A carbon cost plus 10%, at the unit rates submitted in your letter letter sent you under date of November 23, 1933.

The extra work order was as follows:

> It has been determined that in view of subsurface conditions found to exist, it is necessary and in the best interests of the United States to issue an extra work order as follows:
>
> Boulders, sand, gravel, earth, and rock below footing elevations shown on contract drawings shall be removed until bedrock is reached, and extra concrete and reinforcing steel shall be placed as directed by the contracting officer.
>
> Payment for the work herein ordered will be made in accordance with paragraphs 8, 2–04, 4–16, and 4–17 (g) of the specifications as follows:
>
> (1) For the removal of boulders, sand, and gravel, cost plus 10%, at the unit rates submitted in your letter of November 24, 1933, as follows:

Foreman	$1.535	per hour.
Timekeeper	.525	per hour.
Crane Engineer	.75	per hour.
Crane Fireman	.50	per hour.
Skilled Labor	.525	per hour.
Semi-skilled Labor	.4375	per hour.
Common Labor	.35	per hour.
Workmen's Compensation	13.57	per $100.
Public Liability	.27	per $100.
Steam Crane	3.66	per hour or if used 8 hrs. in any one day $11.00 per day. Option to pay full price on any day.
½ yd. Bucket	.75	per hour.
Steam Hammer	3.00	per hour.
Air Compressor	2.50	per hour.
4" Gas Pump	.90	per hour.
3" Gas Pump	.50	per hour.
Pile Extractor	3.00	per hour.
Jack Hammer	.80	per hour.
Air Drill	.80	per hour.
Gasoline Coal Coke Lubricating Oil Steam Cylinder Oil		at current prices at time of purchase.

(2) For extra earth excavation: 30 cents per cubic yard.

(3) For extra rock excavation: $5.00 per cubic yard.

(4) For extra concrete in place: $9.00 per cubic yard.

(5) For extra reinforcing steel in place: Three and one-half cents (3½ cents) per pound.

In accordance with paragraph 8 (c) of the specifications, the contracting officer will furnish such sheet piling as is necessary to properly perform this extra work.

It is understood and agreed that on account of the foregoing extra work, additional time on said contract will be allowed. It is further understood and agreed that all other items and conditions of said contract shall be and remain the same.

The work under this contract has not been completed.

This change order being in excess of $500 does not become effective until approved by the Chief of Engineers.

Therefore, if the foregoing modification of said contract is satisfactory, please note your acceptance in the space provided below.

Yours very truly,

(Signed) J. D. ARTHUR, Jr.,
Major, Corps of Engineers,
District Engineer.

The foregoing modification of said contract is hereby accepted.

THE LACCHI CONSTRUCTION CO.,
(Signed) By PRIMO LACCHI.

Mr. Lacchi was president of plaintiff company.

Upon approval and acceptance by plaintiff the change order was submitted to the Chief of Engineers, acting for the Secretary of War, on December 14, 1933, and was approved and signed by him December 26, 1933. December 29, 1933, the approved change order was sent to plaintiff with a letter of the contracting officer stating that

> There is inclosed, for retention by you, signed copy of Extra Work Order No. 1, under your contract * * *.

No protest was ever made to the Change Order and no claim for rental of the cofferdam in connection with the extra work, which was completed May 2, 1934, was made

until November 9, 1934, after all contract work had been completed on October 25.

34. During the period of the extra work order from December 1, 1933 to May 2, 1934, various repairs were made to the cofferdam on account of leaks. Leaks had to be stopped by the use of rocks, sandbags, rags, etc., extra steel piping was driven, earth fills were tamped, and ashes were added to stop leaks. In December, and again in February, there were blow-ins which flooded the dam. All the work and material used in repairing, strengthening, and maintaining the dam during the period were paid for by the defendant under the extra work order.

35. The approximate cost of construction of the cofferdam was $8,000, and that of reconstructing the dam after its collapse on September 7, 1933, was $6,068.72, or a total of $14,068.72. The extra work covered a period of 152 days. Plaintiff claims rental at $50 a day, plus 10 percent profit on *quantum meruit* under an implied contract resulting from use of the cofferdam by defendant. The plaintiff's proof is not sufficient to support a finding as to a reasonable daily rental *value* of the cofferdam under the circumstances which existed December 1, 1933 to May 2, 1934.

CLAIM 3. COST OF EXTRA PUMPING

36. The contract time for completion of the pumping plant was 120 days and plaintiff intended to use the cofferdam about 80 days. Because of the conditions that made necessary Extra Work Order No. 1, the cofferdam was in use at least 152 days longer than originally intended.

During the period of the extra work order and afterwards, the cofferdam leaked badly (see finding 34). December 1, 1933, defendant installed a large electric pump owned by it which was used in addition to the one which plaintiff had installed during the period of the extra work to May 2, 1934, when this extra pump was removed by defendant. It was necessary in the completion of the contract work for plaintiff to obtain, install, and operate an extra pump. This it did at a cost of $350 for rental, $189 for labor, and $270 for gas and oil, a total of $809. Plaintiff claims this

amount plus 10%, or $80.90, for profit. The leaks in the dam which necessitated the use of this extra pump were not due to any fault or neglect of the defendant.

CLAIM 4. ADDITIONAL COST OF FORMS ON ACCOUNT OF HAVING TO POUR MONOLITHS EXCEEDING 40 FEET IN LENGTH

37. Paragraph 4–11 of the specifications provided that "concrete in structures shall be poured in monoliths not exceeding 40 feet in length."

Article 2 of the contract provided that "in case of difference between drawings and specifications, the specifications shall govern."

38. A monolith is one integral pour of concrete, composing all the elements of such pour, such as beams, girders, walls, etc., which is poured without a joint. The parties differ as to the method of measuring a monolith. Plaintiff in measuring a monolith has taken the perimeter of the concrete pour, plus the sum of the aforesaid elements of the pour, on the assumption that the total of these measurements determines the length of a monolith. Defendant's method of measurement did not include the aforesaid elements of the pour. Measured by either method all the monoliths placed were over 40 feet in length. Plaintiff duly protested pouring concrete in monoliths exceeding 40 feet in length.

39. The substructure was unlike an ordinary wall or dam that could be divided into simple pours of given lengths. The substructure consisted of an east wall, a north wall, a south wall, north and south wing walls, 3 partition walls extending westward from the east wall, beams, girders, columns, floor slab, cantilevers, brackets, etc. A monolith had to be so designed, taking into consideration all the elements of the substructure, that the concrete could be placed in one pour. The strict letter of the specifications as to concrete pours "in monoliths not exceeding 40 feet in length" was violated. With the sundry elements that had to be reckoned with, the concrete pours in monoliths exceeding 40 feet in length was a more efficient and less expensive construction procedure.

40. Plaintiff claims that in being required to pour monoliths in excess of 40 feet in length it was required to expend more for form work than it would have otherwise spent had it been permitted to comply with the specifications, and that on account thereof an increased cost was imposed upon it in the amount of $402.80. It also claims $40.28 for profit.

Because of the many elements in the substructure, it would have been difficult to have poured the concrete in the substructure in monoliths not exceeding 40 feet in length, and to have poured the concrete in monoliths not exceeding 40 feet in length would have added materially to the cost in placing the concrete as directed by defendant.

CLAIM 5. ADDITIONAL BRICK WORK ON ACCOUNT OF ADDED OBSTRUCTIONS OVER THAT STATED IN THE SPECIFICATIONS

41. Paragraph 8–16 of the specifications provided as follows:

> ELECTRIC LIGHTING AND WIRING.—All electric lights and wiring will be furnished and installed by the contracting officer. The contractor shall, however, cooperate with the contracting officer and provide outlets, chases, etc., for the placing of such conduits for the wiring as may be required in the walls of the buildings. It is estimated that four (4) vertical chases and one (1) horizontal duct entrance will be required.

42. A "chase" is a groove or channel constructed in a wall or floor for receiving conduits, pipes, etc. An "outlet" is the terminus of a conduit. A "conduit" is a tube, usually rigid, installed in a building to receive electric wires. A "duct" is a tube, usually fiber, installed in the ground for receiving wires and cables.

43. At the time the contract was entered into the defendant did not expect to have on hand the electric equipment to install as the superstructure was being built, which accounts for the provisions in the specification quoted in finding 41. Because of the delays heretofore referred to, the superstructure was built during September and the first few days of October 1934. By the time this work was commenced, defendant had the electric equipment ready to install as the bricks were being laid, and defendant installed it before the

brickwork was done. Instead of the chases provided for in the specifications, there were placed 8 conduits, which, with the switch boxes, resulted in 20 obstructions around which plaintiff had to build. On December 12, 1934, plaintiff paid $440 to its subcontractor for additional labor on brickwork claimed by the subcontractor on account of electric conduits, etc., set in the walls of the pumping plant.

44. Plaintiff made no protest or claim on account of the conduits, etc., until October 8, 1934, when it wrote the contracting officer as follows:

> We also respectfully call your attention to another matter in connection with this work. The intricate electric conduit work concealed in the masonry wall where large size electric conduits are running vertically, horizontally, or otherwise in oblique directions at various elevations, the excess large boxes grouped togther make it extremely difficult for the masons to properly and expeditiously progress with the work. You will please note that by the peculiar type of masonry walls in this particular building, same being designed for 4″ brick veneer and backing with interlocking denison hollow tile, will necessitate an extra amount of cutting, and an excess quantity of additional mortar, and a great many more brick in place of the hollow tile specified. This condition will not only delay the progress of the building, but has increased the amount of the payroll about 40%.
>
> * * * * *
>
> No mechanical drawing has ever been issued to the contractor on this job, indicating the intricate conduit system, a series of electric control boxes, or size of same showing excess labor cost and corresponding time required for this work as now shown on drawings at the site.
>
> The failure of your office to supply us proper information at the proper time has altered all conditions upon which estimates were made as to not only nullify the contract obligations upon the contractor, but to cause him considerable loss.

October 19, 1934, the contracting officer denied the claim and wrote plaintiff as follows:

> Your attention is invited to paragraph 20 of the specifications which provides that "If the contractor con-

siders any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling."

Your letter of October 8 is the first in which any objection is made to the electric conduits. At the time that letter was written the brickwork was completed and I had no opportunity to effect changes even had your statements been found correct.

The statements contained in this letter of the contracting officer were true, and the plaintiff did not ask for written instructions, or file a written protest as provided for in paragraph 20 of the specifications.

CLAIM 6. BALANCE CLAIMED DUE FOR REMOVAL OF SOFT MATERIAL PLACED ON THE OUTSIDE OF THE COFFERDAM

45. The specifications provided that soft material excavated from within the cofferdam should be deposited immediately outside the cofferdam and that rock and hard material should be deposited at locations designated by the contracting officer. In making the excavation the plaintiff did deposit the soft material immediately outside the cofferdam and the rock and hard material at places as designated by the contracting officer.

46. July 27, 1934, upon instruction from the Government engineer in charge of construction, the inspector informed the president of plaintiff that he was expected to remove the excavated material from outside of the cofferdam. This he refused to do, claiming it was not in his contract or specifications.

47. July 31, 1934, the contracting officer wrote a letter to plaintiff, which by implication directed plaintiff to remove the excavated material deposited outside of the cofferdam. Plaintiff protested this direction by telegram, August 1, 1934, and by letter, August 3, 1934, as not in accordance with the specifications. August 7, 1934, the contracting officer wrote plaintiff a letter, which was received August 9, as follows:

* * * You are again informed that the work must be carried on diligently and not delayed. The decision as to whether the contractor or the United States is paying for the removal of the earth outside the cofferdam will be given you as soon as practicable. Meanwhile you should proceed on the basis that it is your material.

Plaintiff proceeded with the work as directed.

August 22, 1934, the contracting officer in a letter to plaintiff conceded that the intent of the specifications was that the material just outside of the cofferdam should be removed at Government expense. The second and third paragraphs of this letter read as follows:

> A certain amount of rock and hard material was placed against the cofferdam during the extra work period and was so placed at the direction of the contracting officer. This last-mentioned material will also be removed at government expense.
>
> The excavation which has been made by you along the face of the cofferdam will, therefore, be paid for on the cost-plus basis. The balance of excavation will be done by the Government without interference to your continuous work on the booster plant. The time spent by you on the actual excavation mentioned above will be allowed as extra time and the liquidated damages not charged during that time.

The contracting officer made no further decision with reference to this extra work. Defendant's engineer-inspector, acting under authority of the construction engineer and the contracting officer, kept a daily record of extra work performed by plaintiff in connection with the removal of material from outside the cofferdam from August 2 to August 30, 1934. This daily record recorded extra work performed on each of 19 days during August. Each daily record was signed by defendant's engineer-inspector and plaintiff, and showed the daily sums due plaintiff and allocated to labor, material, equipment rental, insurance, supplies, and 10% added. Each daily record was furnished to the contracting officer, and no objection was made to any part of it. The total of the 19 daily records adds up to $1,409.65, the amount which plaintiff claimed at the time for this extra work.

48. In the daily record and report of extra work, rental for the crane was entered each day at $3.75 an hour, and the rental for the trestle or runway on which the crane operated was also recorded and reported at $3.75 an hour.

The trestle which plaintiff constructed at the beginning of the contract work had been removed. Prior to or about the time the order was issued to plaintiff to remove the material mentioned, plaintiff had constructed a timber runway over the concrete substructure on which to operate its crane to pull the sheet piling of the cofferdam and this runway was used for operation of the crane in excavating the material outside the cofferdam before the piling was removed. The runway was used only two days to pull the steel piling. The contracting officer made no decision as to the amount which plaintiff was entitled for this extra work.

The Comptroller General allowed $846.62 of the $1,409.65 above mentioned and disallowed $563.03 thereof. Plaintiff seeks to recover the last-mentioned amount.

In his decision the Comptroller General in arriving at the rental which he allowed for the crane used the figures which he found in Extra Work Order No. 1, relating to different extra work, i. e., "$3.66 per hour or if used 8 hrs. in any one day, $11.00 per day." He disallowed entirely the rental for the runway. These deductions, together with some other minor deductions (not clearly shown in the record), amount to $563.03.

The costs and rentals which were agreed upon by defendant's engineer-inspector and recorded and reported daily to the contracting officer were fair and reasonable.

CLAIM 7. COST OF BULKHEADS OR FORMS

49. Under Extra Work Order No. 1, plaintiff excavated trenches approximately 13 feet deeper than shown on the contract drawings to reach material suitable upon which to place the foundation. To protect the workmen in the trenches the sides were shored with wood and steel sheeting furnished by defendant. In placing the foundation concrete plaintiff used this shoring as side forms. The con-

crete was placed in the foundation in 8 pours. The shoring of the trenches, as installed for protection of the workmen at defendant's expense under Extra Work Order No. 1, was used by plaintiff as side forms. To place the concrete in the foundation in the 8 pours it was necessary for plaintiff to construct 7 bulkheads or end forms running across the trenches. In constructing these bulkheads or end forms, plaintiff expended $41 for 410 square feet of lumber and $164 for labor at 40 cents an hour, making a total of $205.

50. Paragraph 4–16 of the specifications provided, as follows:

> Additional Concrete.—In the event that unfavorable substratum conditions are encountered requiring additional concrete for walls and footings below the grades shown on the drawings mentioned in par. 3, the contractor shall execute such additional work at the contract price per cubic yard for "extra concrete in place."

Extra Work Order No. 1 contains this provision: "(4) extra concrete in place: $9 per cubic yard."

The term "extra concrete in place" as used in the bid form and Art. 1 of the contract relating to unit prices (finding 2), para. 4–16 above, and Extra Work Order No. 1 meant concrete in place for the purposes and uses specified in the contract and drawings, and this included whatever forms that might be necessary to place the concrete properly. Plaintiff's bid of $9 a cubic yard as the unit price for "concrete in place" on "extra work" was based on its assumption that such extra concrete work as it might be required to do would be in channeled solid rock and would not require forms. This assumption was not justified under the terms and conditions of the contract, drawings, and specifications.

Claim 8. Liquidated Damages Deducted

51. Liquidated damages were withheld by the contracting officer from partial payments on vouchers dated, and for the periods, as follows:

Date of voucher	Delay period	Number of days	Amount deducted
1934	1934		
(a) July 25	May 2 to July 25	82	$2,050
(b) Sept. 7	July 26 to Aug. 31	25	625
(c) Oct. 22	Sept. 1 to Oct. 17	47	1,175
(d) Oct. 25	Oct. 18 to Oct. 25	8	200
		162	4,050

The contract completion date was December 3, 1933. Work on Extra Work Order No. 1 commenced December 1, 1933, In the computation the Comptroller General allowed 152 days' extension on the time required for Extra Work Order No. 1, which extended the completion date to May 5, 1934. Deducting 3 days from the period May 2 to July 25 in (a) above, gives the 82 days in the third column.

According to the second paragraph of a letter from the contracting officer to plaintiff, dated October 21, 1934, the delay period of 25 days in (b) was arrived at as follows:

> During the 37-day period July 25 to August 31, inclusive, you performed 91 hours of extra work on your contract. At 8 hours per day this extra work time amounts to 11.4 days, or 12 days approximately, for which no charge was made for liquidated damages.

The number of hours of extra work performed was 93½ instead of 91 hours. In arriving at the extension of time of 12 days the number of extra work hours was counted and divided by 8. Plaintiff lost 12 days' time by failure of defendant to give prompt and definite written directions as to removal of the soft material referred to in Claim 6. On July 28, 1934, plaintiff had completed all the contract work to be performed within the cofferdam and was ready to pull the sheet piling. The piling had to be removed before the superstructural work could begin. Plaintiff should have been given definite instructions about the extra dredging work outside the cofferdam. Such decision was not received until August 9.

The time in (c) and (d) above represents the number of days' delay within each of the two respective periods.

52. The Comptroller General in the final settlement and upon plaintiff's request for extension of time and remission of liquidated damages allowed plaintiff a time extension of 152 days during the period of Extra Work Order No. 1; 12 days from July 26 to August 31, 1934, as shown in the preceding finding; and 3 days for some extra work and 2 days' suspension, both of which apparently occurred after August 31, 1934. The total delay of 326 days in completion was reduced by 169 days and the time for liquidated damages to 157 days, which, at $25 a day, equals $3,925, the amount deducted by the Comptroller from the contract price for liquidated damages. Plaintiff sues to recover this amount. The Comptroller should have reduced the number of days' delay chargeable to plaintiff by an additional 12 days, or to 145 days, and the liquidated damages to $3,625.

CLAIM 9. DELAYS—DAMAGES

53. Plaintiff claims numerous delays totaling 172 days, or, in the alternative, 121 days alleged to have been due to the fault of defendant, originating primarily in the alleged misrepresentation of subsurface conditions, for which delays it seeks to recover under this item expenses for job overhead and central office overheard in the total amount of $7,690.12 for 172 days, or $5,409.91 for 121 days.

In computing its claim for overhead as damages under this item, plaintiff relieves the defendant for 154 days of the delay of 326 days. The period of 154 days is made up of 152 days under Extra Work Order No. 1, and 2 days suspension for installation of bells required by the contract. This leaves 172 days which plaintiff charges to defendant, consisting of 48 days from September 8 to October 24, 1933, in reconstructing the cofferdam, 21 days in placing the third and fourth rings of cofferdam bracing; 16 days on account of electrical work not required; 22 days, removing materials outside the cofferdam; 9 days, removing work placed by defendant adjacent to cofferdam under Extra Work Order No. 1; 2 days, due to installation by defendant of a manhole in connection with electrical work; 3 days of extra work ordered in September 1934, and 51 days for disruption of its

schedule and interruptions in the orderly prosecution of the work.

Plaintiff's alternative claim for 121 days' delay eliminates the last mentioned 51 days.

54. The collapse of the cofferdam was not due to the fault of defendant and it is not responsible for the 69 days' delay resulting therefrom.

The claim for 16 days' delay in building around the obstructions caused by installation by defendant of conduits, outlets, etc., in excess of the time which would have been required to construct the vertical chases and duct is not sustained by the proof. Some additional time was required but the record lacks the data and information from which a reasonable ascertainment or estimation of such additional time can be made. Moreover, plaintiff failed to comply with the contract provisions as to protest and claim in connection with this work. Had plaintiff complied with these provisions it would have been paid for this additional time.

55. Defendant unreasonably delayed plaintiff 12 days in connection with an order for removal of material outside the cofferdam and 2 days in connection with the manhole installed by defendant, a total of 14 days. For this delay plaintiff is entitled to $616 overhead expense.

On the other delays claimed, plaintiff's evidence is not sufficient to support definite findings as to defendant's responsibility therefor.

56. During performance of the contract plaintiff's job overhead was $32 a day and its central office overhead $12 a day, or a total overhead expense of $44 a day.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover $29,256.22 under nine separate items of a claim made under a contract with defendant entered into July 15, 1933, to furnish all labor and materials and perform all work required for the construction of a Booster Pumping Plant to serve as a dam across the Dalecarlia Reservoir serving the District of Columbia. The several items of the claim now urged, and with respect to

which findings of fact established by the greater weight of the evidence of record have been made, are as follows:

Claim 1. Repair cofferdam	$6,068.72
Profit	606.87
Claim 2. Rental cofferdam for extra work	7,600.00
Profit	760.00
Claim 3. Extra pumping	809.00
Profit	80.90
Claim 4. Additional forms	402.80
Profit	40.28
Claim 5. Additional brickwork	440.00
Profit	44.00
Claim 6. Balance dredging costs on extra work	563.03
Claim 7. Bulkheads or concrete forms	205.00
Profit	20.50
Claim 8. Liquidated damages deducted	3,925.00
Claim 9. Field and office overhead	7,690.12
Total	$29,256.22

The general facts having a bearing upon the claims in connection with the preparation and contents of the drawings and specifications, the making of the bid, the execution of the contract, and the construction and collapse of the cofferdam are set forth in findings 1 to 13, inclusive.

The facts as to Claim 1 are set forth in findings 15 to 29, inclusive.

On this claim plaintiff contends that it was misled as to subsurface conditions by defendant's probe chart or drawing, and the contract drawings. Specifically, plaintiff insists that defendant made a positive misrepresentation as to the subsurface conditions on the basis of the facts and information in its possession by leading plaintiff to believe that the subsurface conditions at the "rock" elevations shown consisted of bedrock or solid rock over the entire area of the site of the work and over the area covered by the hand and jet probings made by defendant, whereas the subsurface conditions later found to exist consisted of large boulders. Plaintiff contends that this alleged misrepresentation was the cause of the collapse of the cofferdam and the resulting cost of reconstructing and repairing it, and that if the area underneath the silt and mud had consisted of solid rock the steel sheet cofferdam

piling would have notched into the rock, no water would have come in underneath the piling, and the dam would not have given way and collapsed as it did.

From the Commissioner's report of the facts and a careful study of the evidence of record, these contentions, in our opinion, are not supported by the facts. First, we think there was no misrepresentation by defendant, and, secondly, we are convinced from a study of all the evidence that subsurface conditions were not the cause of the collapse of the cofferdam, but that it collapsed because it was not properly and adequately braced on the inside to withstand the water pressure from the outside.

As to the alleged misrepresentation on the probe drawing, defendant had no information other than that disclosed on this probe chart which fairly and accurately indicated the result of the probings theretofore made. Various elevations were shown at the points of probings over the area, and, in each instance, the chart showed whether the hand and jet probings, both made at the same points, encountered "mud" or "rock" and the elevation in each instance. Another section of the probe chart showed the water elevation; by an irregular line it indicated the approximate average elevation of mud and by another very irregular line indicated the approximate average elevation at which "rock" had been encountered by the probings. The chart also explained in a "note" that the various probings were indicated by a dot when encountering "rock" and by a circle when encountering "mud". A hand probe is made by driving a small rod to point of resistance, and a jet probe is made by using a ¾-inch or a one-inch pipe and forcing the water through it under pressure and extending the pipe to the point of resistance. The chart showed that the jet probings went below the hand probings and that, in practically every instance, the jet probes encountered "rock." Defendant's probe chart indicated as fairly and accurately as possible the information which defendant had as a result of probings—nothing more and nothing less. It is generally understood by engineers, and plaintiff should have known, that a probe chart can be only approximate; it cannot show definite solid rock. It can only indicate what the probe rod or pipe strikes at the point of probe. If it

strikes rock, such rock may be a boulder or it may be solid rock. The boulders may be numerous or so close together, as was the case here, as to cause rock to be encountered by the probings over a large area. In the area in question boulders up to six feet in diameter were found after the earth had been excavated, and it was necessary to excavate as much as 13 feet lower to find solid bedrock suitable for foundation footings. In the case of probings, there is always an element of doubt as to whether the probe has encountered solid rock or bedrock, or has encountered a boulder.

With reference to the cause of the collapse of the cofferdam near the northeast corner at wooden guide pile 7B, the proof shows that the sheet piling was not sufficiently nor adequately braced; that before the collapse certain sheet piling at that point was bending inwardly six inches near the lower portion thereof, due to insufficient bracing and excess excavation at that point; that the water pressure caused the existing bracing to give way near the top of the piling which moved the sheet piling upward, and that section of the cofferdam moved inward about 12 feet, causing the entire dam to be flooded. The proof shows that at this point the toe of the steel piling held firm until the bracing and supports collapsed. At the point of collapse the bracing and struts supporting the upper section of the cofferdam steel piling and wales had been placed at an incline or acute angle to the outside water pressure, and guide pile 7B had been sheared for seven feet at its bottom end or cut in two by the driving of the steel piling. As a result this guide pile, to which the struts and bracings were attached, gave way and there was nothing left to hold the interior bracing and struts in place.

Plaintiff is not entitled to recover on this claim.

In Claim 2, findings 30 to 35, inclusive, plaintiff seeks to recover $7,600 as rental for its cofferdam at $50 a day for 152 days, the period of extra work under Extra Work Order No. 1, plus a profit of 10 percent, of $760.

No recovery can be had under this claim for several reasons. This matter was of necessity included in and covered by the extra work order which was based upon plaintiff's proposal, and was accepted and signed by plaintiff without protest.

Cf. Enos L. Seeds and John Derham, Jr., Individually and Trading as Seeds & Derham v. *United States*, 92 C. Cls. 97. If plaintiff considered that it was being required to furnish plant or equipment not required by the contract in connection with extra work, it was required to protest and appeal. This it did not do. The contract appears to have contemplated that the cofferdam would be at all times available without extra charge or rental for the entire work, including changes. Paragraph 8 of the specifications expressly provided for an allowance only "for the use of any plant or machinery actively employed on this extra work as may be determined by the contracting officer." The contracting officer's decision in the change order not to make any allowance for rental of cofferdam was not erroneous.

Plaintiff asserts that it is entitled to recover this rental and profit on *quantum meruit*. *Quantum meruit* is based upon an implied agreement and there was certainly no such agreement here. Moreover, recovery on an implied contract cannot be had where there is an express contract concerning the subject matter between the parties, as there was here.

In Claim 3 plaintiff seeks to recover $809 and 10 percent profit of $80.90 for alleged extra pumping costs (finding 36). Plaintiff may not recover on this claim for the reasons stated under Claim 1. The necessity for the use of a second pump was not due to any act or fault of defendant. Plaintiff was responsible for the adequacy of the cofferdam and for keeping it dewatered.

In Claim 4 plaintiff seeks to recover $402.80 and 10 percent profit of $40.28 (findings 37 to 40, inclusive). It is insisted that this amount of $402.80 had to be expended by plaintiff for concrete forms by reason of its being required by the contracting officer to pour monoliths exceeding 40 feet in length, as set forth in the specifications. The claim that this excess cost was actually incurred on that account is not supported by the evidence. The fact that monoliths exceeding 40 feet were actually poured does not, of itself, entitle plaintiff to recover. It must prove that it was actually damaged in some determinable amount. Nominal damages cannot be recovered.

In Claim 5 plaintiff seeks to recover $440 and 10 percent profit of $44 for extra cost paid to its subcontractor on account of additional labor due to the necessity of building around obstructions as a result of the installation by defendant of conduits, outlets, etc., before the brick work was done (findings 41 to 44, inclusive).

Although this claim appears to have some merit, it must be denied under the terms of the contract. The contracting officer denied it for the reasons given in his letter to plaintiff, and under the terms of the contract that action must be approved. There is no evidence, other than the subcontractor's receipt of December 12, 1934, for $440, which plaintiff paid after the contracting officer had denied plaintiff's claim for a 40 percent increase in cost, as to what a fair and equitable allowance for such extra work as was performed would have been after taking credit for elimination of the work as called for by the specifications. The subcontractor's bill was based on 240 hours, or 30 days of 8 hours, for a brick mason and 160 hours, or 20 days of 8 hours, for common laborers.

In Claim 6 plaintiff seeks to recover $563.03, the balance due for extra dredging work outside the cofferdam before the sheet piling was removed (findings 45 to 48, inclusive). On the facts plaintiff is entitled to recover this amount. Admittedly plaintiff was not required to do this work under the contract. The contracting officer gave plaintiff written instructions, which he received on August 9, 1934, to do the work as an extra. He did not fix in this order the amount that would be paid, but the contract provided for cost plus 10%, and plaintiff did the work at cost, including a specified rental per hour for the crane and runway or trestle plus 10 percent agreed upon between plaintiff and the contracting officer's authorized representative in charge of the work. A daily record was made by defendant's engineer showing the exact amounts of costs, rentals and profit for each day and the total thereof. This daily record was signed by plaintiff and defendant's engineer and was sent or reported each day to the contracting officer, who made no objection thereto at any time. Nor did he at any time, so far as the record shows, make any adverse decision with reference thereto. We must therefore hold that he ratified and approved what plaintiff

claimed for the extra work which was approved, agreed to and reported each day by the engineer in charge. The Comptroller General was in error in deducting the $563.03. Extra Work Order No. 1 of November 28, 1933, had no connection with this extra work in August 1934 and cannot be used as a basis for payment. The trestle was also used, as defendant points out, for the purpose of pulling the sheet piling, but this does not prove that plaintiff was not entitled to a fair rental for its use on the extra work, and no evidence has been submitted to show that the rental claimed by plaintiff, which was agreed to by both parties and not objected to by the contracting officer, was not a fair and reasonable rental.

In Claim 7 plaintiff seeks to recover $205 plus a profit of 10 percent, or $20.50 (findings 49 and 50, inclusive), for the cost of bulkheads or concrete end forms which were necessary for the pouring of concrete footings in the extended excavations under Extra Work Order No. 1, below the elevations of the footings shown on the original drawings. These excavations were 13 feet deep and five feet wide, and the concrete therein was placed by plaintiff in 8 pours, as directed. The sides of the excavations had been shored for protection with shoring material paid for by the Government under the terms of the extra work order on a cost-plus basis. When the time arrived for pouring the concrete footings plaintiff was permitted to use the shoring for side concrete forms but it was necessary for plaintiff to provide and install seven end forms or bulkheads, as they are called in the record, 13 feet deep and five feet wide. For these forms and the placing thereof plaintiff expended $41 for lumber and $164 for labor. There is no evidence that plaintiff made any protest or claim to the contracting officer at the time or within ten days, as required by par. 20 of the specifications, that it was not required by the contract and the extra work order to do this alleged extra work. This concrete work was completed by May 2, 1934, and plaintiff first made claim on account thereof November 1, 1934, after all contract work had been completed on October 24, 1934. On the evidence the claim must be disallowed on the merits. From the evidence and a reading of the bid, art. 1 of the contract, and paragraph 4–16 of the specifications, it seems obvious that the term "concrete in place" meant

the necessary extra concrete work complete for the uses and purposes intended by the contract. By the contract plaintiff agreed not only to furnish all concrete but to perform all work necessary to its completed state on the concrete portion of the structure, and, of course, this included not only the pouring of concrete but the erection of such extra concrete sections or footings as might be found necessary. No obligation rested upon the Government to furnish any material for the contract work or for extra work, except as specifically provided in the contract or in an extra work order, and there was no such provision made for the furnishing of concrete forms. The bid form called for unit price bids for "extra work" of the character described therein among which was "extra concrete in place". Small quantities were listed in the tabulation on the bid form, but it was expressly stated that these quantities were only for the purpose of "canvassing bids," and attention was expressly called to the pertinent paragraphs of the specifications which placed no limit upon quantities. In the bid plaintiff expressly agreed to execute the standard form of contract, and this form required plaintiff to perform all such extra work as might be found necessary. As executed this contract provided that "Extra work shall be performed on the following basis: * * * for extra concrete in place, Nine Dollars ($9.00) per cubic yard." We think that all these provisions fairly and reasonably interpreted conveyed the meaning that the extra concrete work referred to was to be completed contract work, not merely the furnishing and pouring of concrete as plaintiff contends.

Plaintiff appears to have based its bid of $9.00 for extra concrete in place on the assumption that it would only be required to do a very small amount of extra concrete work, and that such extra concrete would be poured in channeled rock and no forms would be necessary; however, this assumption was not justified, and it cannot now hold the Government responsible for this mistake.

Claim 8 is for recovery of liquidated damages in the amount of $3,925 deducted and withheld by the Comptroller General on final settlement (see findings 51 and 52). On these findings the liquidated damages chargeable to plaintiff

amounted to $3,625 for 145 days' delay rather than $3,925 for 157 days' delay. Plaintiff is therefore entitled to recover $300 on this claim.

Claim 9 is for damages in the amount of $7,690.12 for overhead expense resulting from 172 days' delay in completion, which plaintiff contends was caused by the fault of the defendant (see findings 53 to 56, inclusive). Under these findings plaintiff is entitled to recover $616.

Judgment will be entered in favor of plaintiff for $1,476.03. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

PIERCE OIL CORPORATION, AND HENRY C. RIELY AND ROBERT T. BARTON, JR., AS ITS RECEIVERS, v. THE UNITED STATES

[No. 45442. Decided January 8, 1945]*

On Plaintiffs' Motion for New Trial

Income tax; finality of compromise settlement; excess interest under section 821 of Revenue Act of 1938.—Where in 1936 plaintiffs paid a lump sum in compromise and settlement of taxpayer's entire liability for taxes and interest in respect of the years 1918 to 1920, inclusive, which compromise and settlement was accepted by the Government; and where the lump sum paid and accepted was less than the total of the tax deficiencies, without interest, claimed by the Government and computed in accordance with an opinion of the then Board of Tax Appeals; it is *held* that plaintiffs are not entitled to recover under section 821 of the Revenue Act of 1938. (52 Stat. 447; U. S. Code, Title 26, section 3794 *note*).

Same; legislative history of section 821; intent of Congress.—The legislative history of section 821 of the Revenue Act of 1938 shows that section 821 was intended to apply only in those cases where the taxpayer paid his tax and also accrued statutory delinquent interest at 12 percent per annum during the period from October 24, 1933, to August 30, 1935, by reason of failure to pay the taxes shown upon taxpayer's return or additional taxes assessed within 10 days after notice and demand.

*Plaintiff's petition for writ of certiorari pending.

Same.—In the enactment of section 821 of the Revenue Act of 1938, Congress was legislating for the relief of those few taxpayers who were unable to compromise and settle their accrued statutory liability for the 12 per cent delinquent interest rather than for the relief of those taxpayers who could and did compromise and settle their tax and interest liability.

Same; lump sum settlement without allocation.—The settlement effected by plaintiffs was definitely a compromise for a lump sum of all tax liability, including interest, with reference to the years 1918 to 1920, inclusive, and it was not a compromise calling for payment out of the total sum offered of specific sums for specific liabilities on account of tax for each of the three years and interest in specific sums at certain rates for certain periods.

Same; allocation for record and accounting purposes not material.—The allocation by the Government, for record and bookkeeping purposes, of the lump sum paid by plaintiffs is of no material importance in connection with the question whether plaintiffs are entitled to recover any portion of that amount.

Same; no new remedy under section 821.—Congress, in the enactment of section 821 of the Revenue Act of 1938, upon which the plaintiff in the instant case bases its suit, did not intend to give a taxpayer a new remedy which it would not otherwise have for recovery of any portion of an amount offered and accepted in compromise and settlement of the Government's claim for taxes and interest, especially where the amount so offered and accepted is less than the Government's claim for taxes without interest.

The Reporter's statement of the case:

On June 5, 1944, decision was rendered in this case, the petition being dismissed.

On January 8, 1945, plaintiff's motion for new trial was overruled, the former findings and opinion were withdrawn, the judgment dismissing the opinion to stand, and new findings were filed with an opinion, as shown below.

Mr. Eugene Untermyer for plaintiff.

Mr. Edgar J. Goodrich and *Guggenheimer, Untermyer & Goodrich* on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.

Mr. Robert N. Anderson and *Mr. Fred K. Dyar* on brief.

This case is now before the court on plaintiffs' motion for a new trial.

The Pierce Oil Company and its receivers seek to recover under section 821 of the Revenue Act of 1938 a total of $166,670.87 alleged to represent the excess, over 6 percent, interest alleged to have accrued and to have been collected by defendant from plaintiffs on income and profits taxes in the respective amounts of $70,601.53 for 1918, $81,156.61 for 1919, and $14,912.73 for 1920. The questions presented are (1) whether plaintiffs actually paid any excess interest within the meaning of section 821, *supra;* and (2) whether a compromise settlement on the basis of a lump sum offered by plaintiffs and duly accepted under authority of section 3229, Revised Statutes, is final.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Pierce Oil Corporation was a Virginia corporation which was organized in 1913 and dissolved December 27, 1940, as hereinafter shown. In connection with its dissolution, Henry C. Riely and Robert T. Barton, Jr., were appointed receivers with proper authority, among other powers, to prosecute this suit. For convenience, the Pierce Oil Corporation will hereinafter be referred to as "plaintiff."

2. Plaintiff operated successfully from 1913 until about 1923 when it became involved in financial difficulties, and in 1924, as a solution of these difficulties, the Pierce Petroleum Corporation was formed; it assumed certain duties and the outstanding obligations of plaintiff, and became the operating company; plaintiff functioned as a holding company until about 1930, at which time the Pierce Petroleum Corporation disposed of its property to the Sinclair Consolidated Oil Company in exchange for stock of the oil company. The Pierce Petroleum Corporation continued as a holding company from 1930 until March 11, 1939, when it was dissolved, and its former directors became trustees in liquidation. Both plaintiff and the Pierce Petroleum Corporation are each now represented by trustees in liquidation and the trustees of the two corporations will share in any amount recovered in this suit.

3. Plaintiff duly filed Federal corporation income and profits tax returns for the calendar years 1918, 1919, and 1920. Thereafter, the Commissioner of Internal Revenue

duly proposed deficiencies against plaintiff in the amounts of $1,481,196.88 for 1918, $708,977.29 for 1919, and $363,913.77 for 1920, and plaintiff filed a petition with the United States Board of Tax Appeals for a redetermination of those deficiencies. At the same time two related corporations, Pierce Pipe Line Company and Pierce Navigation Company, also filed petitions with the Board. Later, Pierce Petroleum Corporation filed a petition with the Board on account of the liability asserted against it as transferee of plaintiff. While the petitions were pending before the Board, the Commissioner made a jeopardy assessment against plaintiff under sections 279 and 283, Revenue Act of 1926, and section 273 of the Revenue Act of 1932 for deficiencies and deficiency interest at 6 percent per annum accrued thereon under section 283 (d) of the Revenue Act of 1926 and section 292 of the Revenue Act of 1932 from February 26, 1926, to the date of assessment on January 11, 1933, and the collector issued jeopardy notices and demands for payment on January 13, 1933, as follows:

Year	Tax	Deficiency interest	Total
1918	$1,481,196.88	$611,186.46	$2,092,383.34
1919	708,977.29	292,545.39	1,001,522.68
1920	363,913.77	150,161.79	514,075.56
	2,554,087.94	1,053,893.64	3,607,981.58

At the time of the jeopardy assessment the Board had not decided the issues in the appeal and the amounts assessed were the deficiencies set forth in the Commissioner's deficiency notice.

The term "deficiency interest," as used above and as referred to herein, means statutory interest at the annual rate of 6 percent accruing on deficiencies under section 283 (d), Revenue Act of 1926, from February 26, 1926, to date of assessment of deficiencies, and such interest is assessed at the same time as the deficiency to which it applies, the assessment representing the aggregate amount of a given deficiency plus the deficiency interest. Deficiency interest is to be distinguished from "delinquent interest" (hereinafter referred

to) which means statutory interest at the rates from time to time, usually one percent a month, as provided by law, which, in the absence of an extension of time for payment, or the giving of a bond, accrues from the date of notice and demand until payment or until a bond is given for failure to pay within 10 days after notice and demand by the collector. This latter type of interest is ordinarily computed by the collector upon the total assessment, including deficiency tax and deficiency interest, when collection is made, but it is not assessed until after payment is made. No such delinquent interest was ever assessed in this case.

4. On receipt of the jeopardy notices and demands referred to in the preceding finding, plaintiff did not make payment. In order to stay payment plaintiff on May 17, 1934, executed an income and profits tax bond under sec. 273 (f), Revenue Act of 1932, in the sum of $5,000,000, and as additional security supporting that bond plaintiff deposited with certain escrow agents all of its assets except 1,890 shares of its preferred stock, 33.2575 shares of its common stock, and a bank balance of approximately $14,000. The assets so deposited in escrow included 1,103,419½ shares of Pierce Petroleum Corporation stock, $30,000 in United States Treasury 3 percent notes and $100,000 in United States Treasury 2⅞ percent notes.

On the same day, May 17, 1934, the Pierce Petroleum Corporation executed a similar bond under sec. 273 (f) in the same amount ($5,000,000) in part to obtain a stay in collection and to secure payment of the assessments against plaintiff, referred to in the preceding finding, and in part on account of other assessments against the Pierce Petroleum Corporation; that bond was also secured by certain collateral which included 645,834 shares of common stock of the Consolidated Oil Corporation, $125,000 of United States Treasury 3 percent notes, and $235,000 United States Treasury 2⅞ percent notes.

These bonds were accepted by the collector and they stayed all collection on the jeopardy assessment on and after May 17, 1934.

The record does not show what occurred between the collector and plaintiff from the date of the jeopardy notice and demand on January 13, 1933, to the date of the making and accepting of bonds on May 17, 1934. There is no evidence that the collector did or did not extend the time for payment between January 13, 1933 and May 17, 1934. (See section 296 of the Revenue Act of 1932.)

5. During the course of trial of the case before the Board of Tax Appeals various issues in plaintiff's petition were either waived by plaintiff or conceded by the Commissioner so that when the Board came to promulgate its opinion seven questions remained for decision. On April 17, 1935, the Board's opinion was promulgated (32 B. T. A. 403) which held, among other things, that plaintiff was entitled to special assessment, that a recomputation of plaintiff's income should be made in accordance with the opinion, that proper comparatives should be applied to the redetermined net income in order to determine plaintiff's profits tax, and that if necessary the proceeding would be assigned for further hearing under Rule 62 of the Board before the entry of judgment. On two of the issues involved, namely, gain arising from intercompany liquidation in 1918 in an amount determined by the Board at $2,296,080.20, and a deduction from income for discount on retirement in 1919 of debentures in the face amount of $4,191,700 in exchange for preferred stock, two members of the Board dissented from the conclusions of the majority.

6. After promulgation of the opinion by the Board, conferences were held between representatives of plaintiff and the Commissioner for the purpose of arriving at the proper comparatives and tax rates applicable under special assessment and a recomputation of the income for the several years in accordance with the Board's opinion. November 29, 1935, the parties agreed upon the special assessment rates. At or about that time the Commissioner submitted to plaintiff a recomputation of plaintiff's tax liability under the opinion of the Board as to all issues, including the application of the agreed profits-tax rates under special assessment to plaintiff's income as recomputed by the Commissioner, which recom-

putation showed the following deficiencies in tax without inclusion therein of any interest:

1918	$1, 429, 432. 38
1919	517, 637. 97
1920	95, 117. 32
Total	2, 042, 187. 67

These deficiences were materially less than those originally determined in the deficiency notice and assessed in the jeopardy assessment.

7. The Commissioner's recomputation and the stipulation as to special assessment rates were filed with the Board December 3, 1935, but for reasons which will hereinafter appear no final order of redetermination was entered thereon by the Board either as to the special assessment rates agreed upon by the parties or the deficiencies as recomputed. The time of plaintiff to object to the recomputation was extended from time to time by the Board on account of negotiations which were taking place between the parties for a settlement of plaintiff's tax liability for the several years involved. Plaintiff had under consideration an appeal from the Board's decision to the appropriate Circuit Court of Appeals on the issues which had been decided against it and had advised the Commissioner of its intention to prosecute such an appeal.

8. About the time the stipulation of the parties and the recomputation of the Commissioner were filed with the Board the parties began conferring in connection with negotiations for settlement of the pending controversy with reference to the deficiencies for 1918 to 1920, inclusive. As a result of these discussions, plaintiff submitted an offer on February 18, 1936, to pay $2,035,721.77 in complete settlement and satisfaction of the consolidated tax liabilities of plaintiff and two other affiliated corporations which were involved in the petitions to the Board for 1918, 1919, and 1920, including all interest upon any deficiencies for those years, such offer being subject to certain named conditions. (See finding 10.)

9. Among the conditions set out in that offer of February 18 was one which read as follows:

(c) That the outstanding assessment for additional interest and penalty for the calendar year 1920 be cancelled and annulled upon payment of a nominal sum, since the full amount of said assessment with all interest thereon at the rate of 6% was paid in 1930.

The interest and penalty referred to above represented a part of the statutory 12 percent interest and a 5 percent penalty which had been asserted on account of failure of plaintiff to pay an original tax shown due on its return for 1920 of $306,610.91 at the time required by law, and was not on account of deficiencies heretofore referred to which were involved in the Board proceedings. Plaintiff withheld making payment of that original tax for 1920 for a time under the contention that it was entitled to a loss which would offset the income on which the tax was assessed. However, in 1930 plaintiff paid the original tax assessment plus interest at the rate of 6 percent (½ of the accrued 12 percent interest), $165,569.89, a total of $472,180.80, but did not pay a further sum which by April 1936 amounted to $180,900.44 and which arose by reason of interest at 12 percent instead of 6 percent, and the 5 percent penalty.

In the meantime reorganizations and transfers of assets had taken place involving plaintiff, the Pierce Petroleum Company, and the Sinclair Consolidated Oil Company, through which the last-named corporation had obligated itself to stand liable for this original 1920 tax item up to $500,000. The payment of $472,180.80 was made out of the Sinclair fund of $500,000, leaving a further amount which might be used of $27,819.20.

10. March 31, 1936, plaintiff submitted a revised offer of settlement and satisfaction which differed from the offer of February 18, 1936, referred to in finding 8, only in connection with the condition set out in finding 9 wherein plaintiff had offered to settle the outstanding assessment for additional interest and penalty on the original tax for 1920 upon payment of a nominal sum and now offered to pay the abovementioned amount of $27,819.20 on that account.

The offer of settlement of March 31, 1936, read as follows:

Re: Pierce Oil Corporation (Docket No. 49702)
Pierce Navigation Co., Inc. (Docket No. 49703)
Pierce Pipe Line Co. (Docket No. 49704)

Pierce Oil Corporation hereby offers to pay $2,035,-721.77 in complete settlement and satisfaction of the consolidated tax liabilities of the above-named companies for the calendar years 1918, 1919, and 1920, including all interest upon any deficiencies for the said calendar years, upon the following conditions:

(a) That the above-entitled proceedings be marked settled and that an appropriate order to that effect be entered in the Board of Tax Appeals.

(b) That the assessments for principal and interest against the above-entitled companies for said calendar years be cancelled and annulled.

(c) That the outstanding assessment for additional interest and penalty for the calendar year 1920 be cancelled and annulled upon payment of not to exceed $27,819.20.

(d) That the parties shall waive all right of appeal in the above-entitled proceedings.

(e) That the proceedings in the Board of Tax Appeals entitled "*Pierce Petroleum Corporation, Petitioner* v. *Commissioner of Internal Revenue, Respondent* (Docket No. 71413) for alleged liability as claimed transferee of Pierce Oil Corporation for the calendar years 1918, 1919, and 1920 be marked settled and that an appropriate order to the effect that there is no tax due in respect thereof be entered in the Board of Tax Appeals.

(f) That the assessments for principal and interest against Pierce Petroleum Corporation, as claimed transferee or otherwise, for the calendar years 1918, 1919, and 1920, be cancelled and annulled.

(g) That the jeopardy assessment bonds given by Pierce Oil Corporation and Pierce Petroleum Corporation in respect of said calendar years and the escrow agreements securing the same be cancelled and annulled, and that the collateral in escrow under said agreements be returned to the respective Companies, free of all claims or liens, upon payment of the amount hereby offered and upon the substitution, in the case of Pierce Petroleum Corporation alone of a new jeopardy assessment bond in the sum of $500,000 to cover its possible tax liability for the years 1927–1930, inclusive, and a new escrow agreement under which a sufficient amount, say 50,000 shares of the Common Capital Stock of Consolidated Oil Corporation shall be deposited in escrow. It is distinctly understood that this offer is made in the course and as the result of negotiations, and that, in the event that it is not accepted or that the settlement

> contemplated thereby is not consummated, it is to be null and void and of no force or effect and is not to be used or in any way referred to either in the above-entitled proceedings or in any other proceedings or actions to which Pierce Oil Corporation, Pierce Navigation Company, Pierce Pipe Line Company, or Pierce Petroleum Corporation is a party.
>
> I am authorized, by the directors of Pierce Oil Corporation, to make this offer.

11. On the same day the offer of March 31, 1936 of $2,035,721.77 was submitted, a formal offer in compromise of $27,819.20 was submitted by plaintiff on account of accrued statutory interest and penalty in respect of the 1920 original tax referred to in finding 9 and mentioned under Item (c) of the conditions of the offer of settlement of March 31, 1936. The offer in compromise contained the following statement:

> Payment will be made upon notification of acceptance of this offer and of acceptance of offer in settlement of deficiencies and interest thereon for 1918, 1919, 1920, evidenced by letter of counsel for Pierce Oil Corporation, addressed to Commissioner of Internal Revenue under date of March 31, 1936.

In connection with the two offers in settlement and compromise it was urged by plaintiff that any attempt at that time to liquidate could not under normal conditions result in obtaining a net amount for plaintiff's assets of more than $1,250,000; that plaintiff, unassisted, could not raise enough money to pay its liability under the Board's decision; and that acceptance of the offer in compromise and the offer in settlement and satisfaction of the 1920 original assessment and the proceedings before the Board was suggested with the view of disposing of all pending tax matters of plaintiff and the prompt collection by the Commissioner of a very substantial sum in deficiencies for 1918 to 1920, inclusive, and interest for 1920.

At the time the offer in compromise in connection with the 1920 original tax was submitted, accrued interest at 12 percent on this unpaid original tax in the amount of $165,569.89 and a penalty of 5 percent, $15,330.55, totaling $180,900.44, were outstanding against plaintiff on the books of the collector on account of failure to pay the original 1920 assessment on time, plaintiff having previously paid the original assess-

ment for 1920 with interest at 6 percent. No extension of time for payment had been granted and no bond had been given for this 1920 tax.

12. Since the offer of $2,035,721.77 in settlement and satisfaction of the deficiencies and interest in regard thereto for 1918, 1919, and 1920 was in a lump-sum amount without separation as between deficiencies and interest and since the Board, where the cases were then pending, had jurisdiction to determine deficiencies in tax but did not have jurisdiction to make a determination with respect to interest due or to become due on deficiencies, it was deemed necessary by the Bureau of Internal Revenue to have a computation made which would show amounts as deficiencies for which the Board might enter judgment, exclusive of interest. Assessment of deficiency interest at 6 percent from February 26, 1926, to January 11, 1933, the date of the jeopardy assessment, had also been made and was outstanding on the books of the collector. The Bureau of Internal Revenue, with the approval of the Commissioner, accordingly made a computation which would show what deficiencies, or deficiencies in payment in respect of the tax, with interest at 6 percent and at 12 percent, for certain periods would exactly produce the total sum of $2,035,721.77. The computation was based on the deficiencies recomputed under the opinion of the Board, as shown in finding 6, after reduction of the 1918 deficiency so that the total for all years would equal plaintiff's lump-sum offer of $2,035,721.77, and on the understanding that payment of the amount of $2,035,721.77 would be made by plaintiff on April 30, 1936, and that date was, accordingly, used in the computation. The computation showed the following results:

1918

	Tax	Interest			Tax and interest due	Paid
		From—	To—	Amount		
Assessed	$1,481,196.88	2/26/26	1/11/33	$611,186.46		
Abatement	1,030,882.04			425,372.99		
	450,314.84			185,813.47	$636,128.31	
Interest at 12% on $636,128.31		1/13/33	8/30/35	200,755.12		
Interest at 6% on $636,128.31		8/30/35	4/30/36	25,445.13		
					226,200.25	$862,328.56

1919

Assessed	$708,977.29	2/26/26	1/11/33	$292,545.39		
Abatement	191,339.32			78,952.37		
	517,637.97			213,593.02	$731,230.99	
Interest at 12% on $731,230.99		1/13/33	8/30/35	230,768.47		
Interest at 6% on $731,230.99		8/30/35	4/30/36	29,249.24		
					260,017.71	$991,248.70

1920

Assessed	$363,913.77	2/26/26	1/11/33	$150,161.79		
Abatement	268,796.45			110,913.52		
	95,117.32			39,248.27	$134,365.59	
Interest at 12% on $134,365.59		1/13/33	8/30/35	42,404.30		
Interest at 6% on $134,365.59		8/30/35	4/30/36	5,374.62		$182,144.51
					47,778.92	
						2,035,721.77

In addition the computation showed overassessments for the years 1913, 1914, 1915, and 1916 in the total amount of $17,773.65 and interest thereon of $19,138.44. These years were, under the compromise and settlement offer, finally closed without further action.

13. Both the offer of $27,819.20 in respect of the interest and penalty on the original assessment for 1920 and the offer of $2,035,721.77 with respect to plaintiff's liability in connection with additional taxes and interest thereon for 1918 to 1920, inclusive, were considered by the Commissioner together and at the same time, and were accepted by him on the conditions outlined in plaintiff's offers after appropriate recommendations by subordinate officials for acceptance. These offers were approved by the Acting Secretary of the Treasury April 27, 1936, under authority of section 3229 of the Revised Statutes.

After acceptance of plaintiff's offers, as set out in the preceding finding, a written agreement was prepared for disposition of the matters in controversy substantially as proposed in plaintiff's offer and the closing out of proceedings in the Board of Tax Appeals and the Collector's office. That agreement was signed by counsel for plaintiff, the Commissioner, and the General Counsel of the Treasury Depart-

ment April 28, 1936. The computation referred to in finding 12 made by the Interest Computation Section, Bureau of Internal Revenue, at the request of the attorney handling the case for the Commissioner, as hereinafter more fully set forth in finding 18, was not furnished to plaintiff and it had no knowledge of the details thereof until November 28, 1936, when the Deputy Commissioner, at the request of plaintiff, furnished it with a copy of the computation.

14. The written agreement of April 28 provided that upon payment to the collector on April 30, 1936 of the agreed sums of $2,035,721.77 and $27,819.20, plus an agreement by the taxpayers concerned (including plaintiff) to relinquish all rights and claims to overassessments for the years prior to 1918, certain acts and things were to be done immediately, as follows:

(a) The filing of stipulations with the Board of deficiencies due from plaintiff of $450,314.84 for 1918, $517,-637.97 for 1919, and $95,111.32 for 1920.

(b) Prompt notice by the Commissioner to the collector of the Board's final orders fixing the deficiencies as set out above together with the issuance of certificates of over-assessment to eliminate all balances outstanding except those deficiencies and interest calculated to April 30, 1936, of $412,013.72 for 1918, $473,610.73 for 1919 and $87,027.19 for 1920, in order that the total final deficiencies and interest thereon if payment were made on or before April 30, 1936, should total the stipulated sum of $2,035,721.77, and the issuance by the collector of notice and demand for the last amount mentioned.

(c) Cancellation of all overassessments in favor of the several taxpayers concerned for years prior to 1918.

(d) The filing of a stipulation with the Board to the effect that there were no deficiencies due from the Pierce Petroleum Corporation, as transferee, for the years 1918, 1919, and 1920.

(e) Appropriate notice to the collector that the payment of $27,819.20 was in full satisfaction of the outstanding claims for unpaid interest and penalty of $180,900.44 on the original tax assessment for 1920.

(f) Authorization to the collector and to the escrow agents concerned permitting the release of plaintiff's collateral in order to permit the raising of funds to pay the agreed sums involved, and after payment thereof for the release of plaintiff from its bond and escrow agreement, and similar authorizations with respect to the collateral bond and escrow agreement of the Pierce Petroleum Corporation in regard to its transferee liability.

(g) A waiver by both parties of all rights of appeal from the stipulated Board decision.

The written agreement of April 28, 1936, was ratified, approved, and confirmed by the boards of directors of plaintiff and Pierce Petroleum Corporation on April 30, 1936.

15. In accordance with the agreement referred to in the preceding finding, plaintiff, on April 30, 1936, delivered to the collector two certified checks, one in the amount of $2,035,721.77 and another in the amount of $27,819.20, such delivery taking place in the National City Bank of New York in the presence of a representative of the Commissioner, the collector, plaintiff's counsel, and an escrow agent. Upon delivery of the checks, the securities which had been deposited in escrow as collateral for bonds to secure and stay payment of the jeopardy assessments were released as provided in the agreement, and other conditions with respect to the collateral and escrow agreements were carried out.

16. Upon receipt of the check for $2,035,721.77 the collector on April 30, 1936, issued a separate receipt for each of the years 1918, 1919, and 1920 which described the payment as being for deficiency tax and deficiency interest as follows:

Year	Deficiency tax	Deficiency interest	Amount
1918	$450, 314. 84	$412, 013. 72	$862, 328. 56
1919	517, 637. 97	473, 610. 73	991, 248. 70
1920	95, 117. 32	87, 027. 19	182, 144. 51
Total	1, 063, 070. 13	972, 651. 64	2, 035, 721. 77

The term "deficiency interest" was used on the receipts to include the totals of all interest ("deficiency" and "delinquent") as computed by the Interest Computation Section of the Bureau of Internal Revenue, as shown in finding 18,

whereas under the computation (as shown in finding 12) and as later recorded on the books of the collector (as shown in finding 20), a segregation of the two tabulations of interest was made as follows:

Year	Deficiency interest	Delinquent interest	Total
1918	$185, 813. 47	$226, 200. 25	$412, 013. 72
1919	213, 593. 02	260, 017. 71	473, 610. 73
1920	39, 248. 27	47, 778. 92	87, 027. 19
Total	438, 654. 76	533, 996. 88	972, 651. 64

17. Immediately upon the carrying out of the arrangements above referred to and on the same day, advice was sent to the Commissioner and to plaintiff's counsel in Washington as a result of which proper action was taken to have appropriate orders as mentioned in finding 14 (a) entered by the Board of Tax Appeals with respect to the proceedings pending before it. The order of the Board entered on April 30, 1936, read as follows:

> In accordance with stipulation filed by the parties on April 30, 1936, it is
>
> Ordered, adjudged, and decided that for 1918 there is a deficiency of $450,314.84 in income, excess profits, and war profits taxes, and an unpaid jeopardy assessment of $1,030,882.04 to be abated; that for 1919 there is a deficiency of $517,637.97 in income, excess profits, and war profits taxes, and an unpaid jeopardy assessment of $191,339.32 to be abated; and that for 1920 there is a deficiency of $95,117.32 in income, excess profits, and war profits taxes, and an unpaid jeopardy assessment of $268,796.45 to be abated.

18. The computation, the results of which are tabulated in finding 12 and reflected in the figures in finding 16, was prepared in the manner and by the method set forth below:

The Government attorney representing the Commissioner of Internal Revenue in the negotiations with plaintiff and the handling of plaintiff's offer of $2,035,721.77 in settlement and satisfaction of all matters relating to deficiencies and interest for 1918 to 1920, inclusive, and the disposition of the mat-

ters of closing out the proceedings before the Board and the collector's records, after plaintiff's offer had been accepted by the Commissioner and the Secretary of the Treasury, requested the Interest Computation Section of the Bureau of Internal Revenue to make a computation in connection with deficiencies in tax computed under the opinion of the Board as set forth in finding 6, with respect to which a jeopardy assessment mentioned in finding 3 had been made against plaintiff, so that the amounts for the years 1918 to 1920, inclusive, as set forth in such computation as tax and interest would equal the amount of plaintiff's offer of $2,035,721.77. There is no evidence that either the plaintiff or the Government considered that any definite portion of the lump-sum offer of $2,035,721.77 agreed upon specifically represented interest, as such, at either 6 or 12 percent. In this computation the interest used was at the rate of 6 percent from February 26, 1926 to January 11, 1933, and at the rate of 12 percent from January 13, 1933 to August 30, 1935.

Shortly after plaintiff's compromise offer of $2,035,721.77 had been agreed upon and submitted for acceptance, and shortly before the Government's attorney handling the matter for the Commissioner of Internal Revenue requested the above-mentioned computation, he had, himself, made a computation distributing the agreed amount of $2,035,721.77 to amounts called tax and interest, but in his interest computation he used 6 percent only over the entire period from February 26, 1926, to April 30, 1936. If the Interest Computation Section of the Bureau of Internal Revenue had used an interest rate of 6 percent from February 26, 1926, to April 30, 1936, instead of interest at 12 percent (as shown in the tabulation in finding 12) from January 13, 1933, to August 30, 1935, the amount representing the difference between the 12 percent and 6 percent interest would, in the distribution of the lump-sum offer of plaintiff, have been reflected by the computation in the amount set forth therein as tax or deficiency in payment for 1918. In other words, the amount of $450,314.84 shown in the computation as tax, or deficiency in payment of tax for 1918, would have been increased in the amount of such difference in the interest computation,

and plaintiff would have paid the same total amount, i. e., $2,035,721.77.

Plaintiff's offer of $2,035,721.77 in full settlement and satisfaction of deficiencies for 1918 to 1920, inclusive, including all interest with respect to deficiencies for those years was $6,465.90 less than the total of the deficiencies in tax recomputed by the Commissioner in accordance with the Board's opinion of April 17, 1935 (findings 6 and 7). The Interest Computation Section deducted this difference from the deficiency of $1,481,196.88 as recomputed for 1918 so as to make the total of the deficiencies without interest equal plaintiff's order. No change was made for the purpose of computation, as set forth in finding 12, of deficiencies for 1919 and 1920 as recomputed under the Board's opinion. The Interest Computation section then proceeded to compute deficiency interest on these deficiencies for 1919 and 1920 at 6 percent from February 26, 1926 to January 11, 1933 (date of assessment); delinquent interest at 12 percent from January 13, 1933 (date of notice and demand) to August 30, 1935 (date the 12 percent interest was repealed); and deficiency interest at 6 percent from August 30, 1935 (under section 404, Revenue Act of 1935) to April 30, 1936, the last date being the date on which that section had been advised that plaintiff would make payment of its offer of $2,035,721.77. The total of the interest items so computed was $972,651.64. The amounts representing the 6- and 12-percent interest so computed for 1919 and 1920, totaling $560,637.92, were deducted from the balance ($1,422,966.48) of the recomputed deficiency for 1918, which brought the 1918 deficiency down to $862,328.56. The Interest Computation Section then, by a method usually employed in such cases the details of which are not disclosed by the evidence, computed, out of this sum ($862,328.56) as shown in finding 12, deficiency interest at 6 percent from February 26, 1926 to January 11, 1933, of $185,813.47; delinquent interest at 12 percent from January 13, 1933 to August 30, 1935, of $200,755.12, and deficiency interest at 6 percent from August 30, 1935 to April 30, 1936, of $25,445.13, totaling $412,013.72. The deduction of this amount from the balance of $862,328.56 in respect of the 1918 deficiency left $450,314.84 which was treated as tax. This

original computation, from which the computation set forth in finding 12 was made, was prepared solely for the purpose of distributing plaintiff's lump-sum offer of $2,035,721.77 to so-called tax and interest, and described the amount of $450,314.84 shown therein as remaining due on account of the deficiency for 1918 computed under the Board's opinion in the following words: "Board to Determine a Deficiency which is really a deficiency in payment." This original computation also contained under the column headed "Total 12 & 6% non-payment Interest to 4/30/36" the following note of explanation—"Nonpayment Interest accrues on amount remaining unpaid from date of notice and demand 1/13/33 to date of payment. It is understood that tax will be paid April 30, 1936."

19. After entry of the order of the Board, set forth in finding 17, the Commissioner issued separate certificates of overassessment each based on the same schedule of over-assessments which showed the amounts abated as follows:

CALENDAR YEAR 1918

	Tax	Interest
Total assessed	$2, 172, 639. 77	$611, 186. 46
Correct tax liability	1, 141. 757. 73	185, 813. 47
Overassessment	$1, 030, 882. 04	$425, 372. 99
Abated: $1,456,255.03.		

CALENDAR YEAR 1919

	Tax	Interest
Total assessed	$941, 697. 02	$292. 545. 39
Correct tax liability	750, 357. 70	213, 593. 02
Overassessment	$191, 339. 32	$78, 952. 37
Abated: $270,291.69.		

CALENDAR YEAR 1920

	Tax	Interest
Total assessed	$670, 524. 68	$150, 161. 79
Correct tax liability	401, 728. 23	39, 248. 27
Overassessment	$268. 796. 45	$110, 913. 52
Abated: $379,709.97.		

When effect was given to the above abatements, deficiency tax and deficiency interest which had been assessed as heretofore shown remained outstanding as follows:

Year	Deficiency tax	Deficiency interest	Totals
1918	$450, 314. 84	$185, 813. 47	$636. 128. 31
1919	517. 637. 97	213, 593. 02	731, 230. 99
1920	95, 117. 32	39, 248. 27	134. 365. 59
	$1, 063, 070. 13	$438, 654. 76	$1, 501. 724. 89

20. At the time the check of $2,035,721.77 was received by the collector, appropriate schedules of overassessments or certificates of overassessments had not been received by him as a basis for an application of the cash payment and accordingly the entire amount was placed in the collector's 9–C account which is an account in which he records unidentified collections pending receipt from the Commissioner of an appropriate assessment or overassessment schedule. Upon receipt by the collector of such schedule and the certificates of overassessment referred to above, appropriate entries were made on June 30, 1936, of the scheduled abatements. By journal entries on July 21, 1936, the amount heretofore referred to as having been recorded in the 9–C account was transferred as credits against the outstanding assessments against plaintiff of deficiency tax and interest for 1918, 1919, and 1920. Those entries of abatements and payments closed the taxpayer's accounts leaving no balance of tax or interest due for any of the three years. The final entries on the collector's books show that the total amount of $2,035,721.77 was credited in payment of deficiency tax, deficiency interest, and delinquent interest as follows:

Year	Deficiency tax	Deficiency interest	Delinquent interest	Total
1918	$450, 314. 84	$185, 813. 47	$226, 200. 25	$862, 328. 56
1919	517, 637. 97	213, 593. 02	260, 017. 71	991, 248. 70
1920	95, 117. 32	39, 248. 27	47, 778. 92	182, 144. 51
	1, 063, 070. 13	438, 654. 76	533, 996. 88	2, 035, 721. 77

The delinquent interest set out in this tabulation was computed at the rates and in the manner shown in findings 12 and 18.

The deficiency taxes shown above included both income and profits taxes but it can not be determined from the

record what portion represented income tax and what portion profits tax. The segregation of the total payment as among tax, deficiency interest, and delinquent interest on the collector's books has at all times been shown since their entry as indicated above.

21. If the amounts shown as delinquent interest on the collector's records had been computed at 6 percent instead of 12 percent for the period October 25, 1933 to August 29, 1935, both inclusive, the amounts of such interest shown for each of the years 1918, 1919, and 1920 would have been reduced by the respective amounts of $70,601.53, $81,156.61, and $14,912.73, a total of $166,670.87.

22. November 12, 1938, plaintiff filed claims for refund of excess interest alleged to have been paid in connection with the settlement offer of $2,035,721.77 for the years 1918, 1919, and 1920 on the ground that it had paid interest in excess of 6 percent per annum on delinquent additional income taxes for each of those years for the period October 24, 1933 to August 30, 1935, and was entitled to a refund of that excess interest under the provisions of Section 821 of the Revenue Act of 1938. The Commissioner rejected those claims May 31, 1939.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The Pierce Oil Corporation and its receivers, herein referred to as "plaintiff", brought this suit under section 821 of the Revenue Act of 1938 (52 Stat. 447; Title 26, U. S. Code, section 3794 *note*) upon rejected claims for refund to recover $166,670.87 representing one-half of alleged accrued interest of 12 percent per annum from October 24, 1933 to August 30, 1935, which interest it is alleged accrued and was paid for the period January 13, 1933 to August 30, 1935 upon additional income taxes. The several amounts making up the total sought to be recovered as interest paid are $70,601.53 for 1918, $81,156.61 for 1919, and $14,912.73 for 1920.

Section 821, *supra*, is as follows:

> *Interest accruing after October 24, 1933, and before August 30, 1935, on delinquent income, estate and gift taxes.*

> Interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes shall be computed at the rate of 6 per centum per annum. Any such interest accruing during such period which has been collected prior to the date of the enactment of this Act in excess of such rate shall be credited or refunded to the taxpayer, if claim therefor is filed within six months after the date of the enactment of this Act. No interest shall be allowed or paid on any such credit or refund.

The above-quoted section was included in the Revenue Act of 1938 as a Senate Amendment offered on the Senate Floor while the act was under consideration and was agreed to on April 9, 1938, at which time the following occurred (Cong. Record. Vol. 83, Part 5, p. 5174):

> MR. KING. Mr. President, I send to the desk an amendment, with an explanation of it which I ask to have printed in the Record.
>
> The VICE PRESIDENT. The amendment will be stated.
>
> The CHIEF CLERK. On page 369, between lines 7 and 8, it is proposed to insert the following new section: * * *
>
> MR. HARRISON. I have no objection to that amendment.
>
> The VICE PRESIDENT. Without objection, the amendment is agreed to; and, without objection, the explanation submitted by the Senator from Utah will be printed in the Record.
>
> The explanation is as follows:
>
> The purpose of this amendment is to reduce from 12 percent to 6 percent the interest rate in the case of a few taxpayers who during the depression were compelled to obtain extensions of time to pay their taxes. For many years the Treasury in such cases compromised interest liability for 6 percent, and in 1935 the exclusive 12-percent rate was reduced to 6 percent on the recommendation of the Treasury. In the case of a comparatively few, however, the Treasury was prevented from compromising and was compelled to collect the 12 percent because of an opinion of the Attorney General rendered in October 1933. This amendment cures the discrimination against those few taxpayers and gives equal treatment to all.

Plaintiff's claims for refund of alleged accrued interest in excess of 6 percent which it claimed to have paid were grounded wholly upon the provisions of section 821, and

the only facts relied upon in support of those claims consisted of a computation, the results of which are set forth in finding 12, and which was made under the circumstances and in the manner set forth in finding 18. The grounds and the facts stated and relied upon as a basis for this suit are the same as set forth in the refund claims, in which plaintiff specifically disclaimed any desire, intention, or consent as to the reopening, disclaiming, setting aside, or modification of the offer of $2,035,721.77 in settlement and satisfaction of the controversy between the plaintiff and the Government with reference to plaintiff's entire liability for the taxable years 1918, 1919, and 1920.

The position of plaintiff as stated in its brief and argument is, in substance, that under section 821 it is entitled to a refund of delinquent interest which it alleges it paid in excess of 6 percentum on certain additional taxes for the period October 25, 1933 to August 29, 1935, both dates inclusive. It insists that this section is mandatory and that its right to recover the alleged accrued interest under the section is not affected by its accepted compromise offer of $2,035,721.77 in settlement and satisfaction of its entire liabilities for tax and interest with respect to the three years.

The position taken by counsel for the defendant is, in substance, first, that section 821 does not apply to this case because plaintiff did not pay any 12 percent statutory delinquent interest, as such, on additional taxes, but paid only a lump sum of $2,035,721.77 offered and accepted by the Government in compromise and settlement of plaintiff's entire tax and interest liability in respect of the years 1918 to 1920, inclusive, which amount of $2,035,721.77 was $6,465.90 less than the total of the deficiencies in tax without interest claimed by the Government and computed in accordance with an opinion of the Board of Tax Appeals; second, that section 821 was not intended to apply to a case where less than the full amount of tax and accrued delinquent interest thereon of 12 percent was paid; and, third, that the compromise and settlement was final and cannot be reopened or modified under section 821.

Upon the facts disclosed by the record and set forth in the findings we are of opinion that plaintiff is not entitled to recover.

By clear language, section 821 applies and was intended to apply, as shown by the explanation made in the Senate, only in those cases where the taxpayer paid in full his tax and also accrued statutory delinquent interest at 12 percent during the period from October 24, 1933 to August 30, 1935, by reason of failure to pay the taxes shown upon its return, or additional taxes assessed, within ten days after notice and demand. The purpose of the section was to give relief to "those few taxpayers" who, because of an opinion of the Attorney General of October 24, 1933 (38 Op. A. G. 94), had been unable to compromise such accrued 12 percent delinquent interest. That opinion is not of importance here; it did not apply to compromise settlements in proper cases, such as the case of this taxpayer, and it was so clarified October 2, 1934 (38 Op. A. G. 98), long before plaintiff's case was settled by compromise of the disputed tax and interest liability.

A clear indication of Congressional intention would be necessary to justify an interpretation and application of section 821 so as to reopen compromise settlements of tax and interest liability where a lump-sum amount offered by the taxpayer as the most he could pay, and accepted on that ground, under authority to compromise, is less than the disputed tax without interest determined and claimed at the time of the offer. Indication of such an intent is entirely absent in the language and explanation of the section. On the contrary, it appears clear that Congress was legislating for the relief of those few taxpayers who were unable to compromise and settle their accrued statutory liability for the 12 percent delinquent interest, rather than for the relief of those taxpayers who could and did compromise and settle their liquidated though disputed tax and interest liability.

In this case the record discloses that the Commissioner of Internal Revenue made a final determination of deficiencies for 1918 to 1920, inclusive, and mailed to plaintiff notice thereof, and that plaintiff instituted a proceeding before the Board of Tax Appeals, now the Tax Court of the United States, for redetermination thereof. The Board delivered an opinion deciding the issues presented, and a

recomputation thereafter made of the deficiencies in accordance with the opinion of the Board showed a reduction of $508,900.27 in the total of the deficiencies originally determined by the Commissioner and assessed, in the meantime, under a jeopardy assessment. The total of the deficiencies so recomputed was $2,042,187.67. Upon filing the recomputation with the Board plaintiff initiated negotiations with the Government for settlement of all matters relating to its liability with reference to the deficiencies, including interest for the three years, and indicated to the Government that if a settlement could not be agreed upon it would appeal the Board's decisions on certain issues. These negotiations continued for some time and culminated in plaintiff's lump-sum offer of $2,035,721.77 on February 18, 1936, which was renewed on March 31 with the offer of a specific amount, $27,819.20, in compromise of accrued delinquent interest at 12 percent and a penalty of 5 percent on the unpaid 1920 original tax—the unpaid original 1920 tax with accrued interest of 6 percent, totaling $472,182.80, had been paid in 1930 before the offers in compromise and settlement were made.

In the negotiations leading to plaintiff's offer of $2,035,-721.77 and the acceptance thereof, plaintiff disputed certain issues decided by the Board; the Government stood on the deficiencies as recomputed on the Board's opinion and wanted to obtain those deficiencies, or as much thereof as plaintiff could pay. The settlement was therefore definitely a compromise of all liability with reference to the years 1918 to 1920, inclusive, for a lump sum, and not a compromise calling for payment out of the total sum offered of specific sums for specific liabilities on account of tax for each of the three years and interest in specific sums at certain rates for certain periods. If plaintiff had considered that it was making such a specific offer we think some mention would have been made in the offer, or in the negotiations, to such an allocation of the amount offered to tax and interest.

Plaintiff's offer quoted in finding 10 shows that plaintiff was not interested in the allocation or distribution of the amount of its offer by the Government. Plaintiff asked only that upon acceptance of the lump-sum offer the proceeding before the Board "be marked settled and that an

appropriate order to that effect be entered in the Board"; that the jeopardy assessment against it "for principal and interest * * * for said calendar years be cancelled and annulled"; that the proceedings in the Board of the Pierce Petroleum Corporation for alleged transferee liability "be marked settled" and that an order be entered by the Board of no tax due in respect of such transferee liability; that the jeopardy assessment for principal and interest against the Pierce Petroleum Corporation, as transferee for 1918 to 1920, inclusive, "be cancelled and annulled"; and that the jeopardy assessment bonds and escrow surety agreements "be cancelled and annulled."

Plaintiff got exactly what it asked for in connection with the lump-sum amount of $2,035,721.77 offered and paid. The fact that the method, or mechanics, employed by the Government in closing the records of the proceeding before the Board and in the Collector's office differed somewhat from the way which plaintiff requested in its offer that they be closed is, in the circumstances, of no material importance in connection with the question whether plaintiff is entitled to recover any portion of the lump-sum amount which it paid. The evidence of record shows that whatever allocation or disposition might have been made by the Government, for record and bookkeeping purposes, of the amount offered and paid by plaintiff, it would have paid no more and no less (finding 18). The Government had a right to allocate or distribute the lump-sum amount offered and accepted in compromise and settlement of plaintiff's entire liability for the three years in any way it saw fit, since plaintiff made no allocation in its offer, and the allocation or distribution made by the Government did not prove that plaintiff was paying any specific sum as 12 percent interest as such. The proof shows that the matter of 12 percent delinquent interest in connection with the jeopardy assessment did not occur to the Government attorney handling the negotiations and settlement with plaintiff's attorneys until about two months after the settlement offer was agreed upon and made by plaintiff. This 12-percent interest matter then occurred to him only because someone else in the Interest Computation Section of the Bureau of Internal Revenue included it in

the computation allocating plaintiff's lump-sum offer to so-called tax and interest.

Under plaintiff's offer as made and accepted and under the law relating to the finality of compromises, plaintiff was not in a position two years later to insist under section 821 of the Revenue Act of 1938 upon a return to it by the Government of $166,670.87 or of any amount of the sum paid in compromise and settlement on the sole ground that in a distribution computation made by the Government before plaintiff made payment the total sum of $972,651.64, out of $2,035,721.77, was computed and distributed for bookkeeping purposes to interest, including delinquent interest at 12 percent in the amount of $473,927.89 computed for the three years from January 13, 1933 to August 30, 1935. Plaintiff must prove not only that it intended to pay the 12 percent interest as such but that it represented a liability and that it actually paid it. Plaintiff has failed to prove this.

The agreement signed by plaintiff and the Government on April 28, 1936, after plaintiff's offer had been accepted (finding 14), does not help plaintiff. In substance that agreement was for the purpose of promptly closing the transactions on the records of the Board and the Collector's office relating to the years 1918 to 1920, inclusive, and permitting plaintiff to pay $2,035,721.77, all as near simultaneously as possible on April 30, 1936.

The interest computation on which this suit is based was not furnished to plaintiff until November 26, 1936, nearly four months after payment, when a statement of the computation was mailed to plaintiff at its request by the Deputy Commissioner of Internal Revenue. This statement showed in detail the distribution of the $2,035,721.77 to amounts designated as tax, deficiency interest at 6 percent from February 26, 1926 to January 11, 1933, delinquent interest at 12 percent from January 13, 1933 to August 30, 1935, and deficiency interest at 6 percent from August 30, 1935 to April 30, 1936. The amount of $972,651.64 so computed as interest plus amounts totaling $1,063,070.13, treated in the computation as tax for 1918 to 1920, inclusive, or as "a deficiency which is really a deficiency in payment," as it was described in the original computation, equaled plaintiff's offer of $2,035,721.77. For the reasons stated above we think plaintiff is not entitled to recover.

Plaintiff gave and the Government accepted bonds on May 17, 1934 "to stay the collection of the assessments hereinbefore specified in the manner provided for in Section 279 of the Revenue Act of 1926 and Section 273 of the Revenue Act of 1932." The bonds referred to in the findings, although not given within ten days after the jeopardy notice and demand on January 13, 1933, were expressly made and accepted under sec. 273 (f) of the Revenue Act of 1932 and stayed the collection of the jeopardy assessment until April 30, 1936. The section mentioned gave the taxpayer the undeniable right to file a bond within ten days after notice and demand, and while the Government might refuse to accept a bond to stay collection after the 10-day period and proceed to enforce collection, there is no statutory prohibition against the giving and the accepting of a bond to stay collection after such period, and there is no provision that a bond so given and accepted will not be effective for the purpose of payment by the taxpayer of interest at the rate of 6 percent only. See secs. 273, (g) and (i), and 296 of the Revenue Act of 1932. However it is not necessary to decide what effect the giving of a bond after the 10-day period following notice and demand would, under the statute, have on the amount of interest collectible, or whether art. 1181, Reg. 77, insofar as it provides for collection of interest at 12-percent, is valid or invalid for we are of opinion that Congress did not intend by sec. 821 of the Revenue Act of 1938, upon which plaintiff bases this suit, to give a taxpayer a new remedy which it would not otherwise have for recovery of any portion of an amount offered and accepted in compromise and settlement of the Government's claim for taxes and interest, especially where the amount so offered and accepted is less than the Government's claim for taxes without interest.

Plaintiff's motion for a new trial is denied. The former findings and opinion are vacated and withdrawn, and the findings and opinion herein are this day filed, the former conclusion of law and judgment, which are included herein, dismissing the petition to stand. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ALMA DESK COMPANY v. THE UNITED STATES

[No. 44413. Decided October 2, 1944]

On the Proofs

Increased labor costs under the National Industrial Recovery Administration Act; statute of limitation on filing claims.—Following the decision in *Douglas Aircraft Construction Co.* v. *United States*, 95 C. Cls. 745, 759, it is *held* that under the provisions of the Act of June 25, 1938 (52 Stat. 1197) and the Act of June 16, 1934 (48 Stat. 974), claims for increased labor costs due to the enactment of the National Industrial Recovery Administration Act must be presented within six months from the time of completion of the contract, or six months after the passage of the 1934 Act.

Same; date contract completed.—Date of payment of the contract price is not material in the determination of the limitation period, fixing date of completion of contract as one of the dates on which the statute begins to run.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff. *Messrs. Lyon & Lyon* were on the brief.

Mr. Lester Schoene, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Mary K. Fagan* was on the brief.

The court made special findings of fact as follows, upon a stipulation of facts entered into by the parties:

1. On the 17th day of May 1933, the plaintiff and the defendant, through the Chief of the Division of Supply, Treasury Department, Washington, D. C., entered into a contract, TBS No. 56700, for the furnishing of certain special furniture for Government buildings. The articles to be furnished were not articles of general and commercial use, but were specially manufactured in accordance with Government specifications for the Government's use in Post Offices. The plaintiff agreed to furnish such articles listed in the contract as might be ordered by the Government from time to time between the effective date of the contract and June 30, 1934. When ordered the articles were required to be shipped by plaintiff within 75 days from the date of the order.

2. However, the plaintiff, in anticipation of orders from the Government, had manufactured a quantity of furniture and at the expiration date of the contract it had on hand a quantity of goods so manufactured by it. It then undertook to dispose of these surplus articles.

3. On September 19, 1934, it wrote its sales agents as follows:

> We find we have left on hand after filling last year's orders the following Post Office furniture made according to Treasury Department Specifications: [Items listed]. * * * We have written all the firms to whom the contract was awarded for the year ended June 30, 1935, offering them our stock but of course moving these in that round about way is very slow process. We are writing to ask that you keep in close touch with the proper parties and work off the stock we have on hand as quick as possible. Of course, we understand that we would have to furnish these items at the present contract price and that we would have to stand any excess freight charges that may develop because of shipment from High Point instead of from contract source. We should be willing to do this. We also understand that these left over items cannot be included in any claim we submit for additional compensation on account of NRA, on last year's contract. Please consider this matter carefully and see if there is not some way that you can work these goods off for us * * *.

4. On September 27, 1934, it wrote the Purchasing Agent, Post Office Department, Washington, D. C., listing the inventory on hand, and stating in part:

> In order to move them quickly we will accept orders at the present fiscal year price and will absorb any extra freight the government may have to pay because of shipment being made from this point.

5. On September 29, 1934, it received a letter from Charles Rubel and Company, notifying it that they had good prospects for disposing of plaintiff's surplus stock, and on October 24, 1934, it received a further letter from Charles Rubel and Company stating that they would receive an order for the surplus stock in tomorrow's mail.

6. Immediately thereafter plaintiff received from the Purchasing Agent of the Post Office Department at Washington, D. C., orders FB–5792 and FB–5794, which were dated back to June 30, 1934, ordering all or a part of plaintiff's surplus stock. Government bills of lading were enclosed with the orders. In pursuance thereof plaintiff shipped 36 items to the Postmaster, New York City, on October 29, 1934, and 31 items to the Postmaster, Chicago, Illinois, on October 30, 1934. Bills therefor were sent to the Post Office Department at Washington on the day the orders were shipped and have been paid as rendered.

7. On April 26, 1935, plaintiff filed its claim for increased cost for the performance of its contract entered into May 17, 1933.

8. On October 19, 1934, the General Accounting Office, Post Office Department Division, Washington, D. C., sent plaintiff a Notice of Settlement of Claim of Order No. FB–5567, being the shipment made by plaintiff on October 9, 1934. On October 20, 1934, a Post Office Settlement Warrant No. 78008 in the sum of $26.10 was issued to plaintiff and forwarded to it at High Point, North Carolina. Upon receipt it was endorsed by plaintiff and deposited for collection through the Wachovia Bank and Trust Company at High Point, North Carolina.

On October 26, 1934, this warrant was stamped by the Federal Reserve Bank at Richmond, Virginia, as follows: "Received payment from the Treasurer of the United States—Oct. 26, 1934—Federal Reserve Bank, Richmond, Virginia." A copy of this Settlement Warrant follows:

634120—45——27

POST OFFICE Washington, D. C. Oct. 20, 1934 1–1
Settlement 78,008
Warrant

4 TREASURER OF THE UNITED STATES 15–51

SEAL

Object for Which Drawn: Payment for Transportation of the Mails or Other Postal Expenditures

Pay to the
Order of ALMA DESK COMPANY ________________ $26.10
The sum of TWENTY-SIX AND 10/100 Dollars
Mail Route Number
JAMES A. FARLEY
Postmaster General
Period
Countersigned
By A. F. BETTS
Acting Assistant Superintendent
Division of Finance
J. R. McCARL
Comptroller General
of the United States
By L. A. TUCKER (?)
47–001

ENDORSEMENTS (Reverse Side)

1st
Wachovia Bank & Trust Co.
High Point, N. C.

2nd
Not legible

3rd
Received payment from
THE TREASURER OF THE UNITED STATES
Oct. 26, 1934
FEDERAL RESERVE BANK,
RICHMOND, VA.
68–3 68–3

9. The total contract price of goods manufactured after June 16, 1933 and shipped by the plaintiff on contract TBS 56700 was $12,844.33. The amount of the contract price of the goods included in the shipments of October 20 and 30, 1934, as hereinabove set forth, was $1,124.27.

10. As a result of the enactment of the National Industrial Recovery Act the plaintiff's increased costs from the manufacture of the articles described in and shipped on contract TBS 56700 were $1,000.00.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover excess costs incurred as the result of the passage of the National Industrial Recovery Act. The defendant interposes the defense of the statute of limitations prescribed by the Acts of June 25, 1938 (52 Stat. 1197) and the Act of June 16, 1934 (48 Stat. 974).

The Act of 1938 requires as a condition to recovery under it that claims should have been presented within the time limit fixed by the Act of 1934. That Act in section 4 fixes the time limit as follows:

> No claim hereunder shall be considered or allowed unless presented within six months from the date of approval of this Act or, at the option of the claimant, within six months after the completion of the contract, except in the discretion of the Comptroller General for good cause shown by the claimant.

We think it was the primary intention of Congress to bar claims that were not presented within six months from the time the Act was passed, but it was recognized that some contracts might not have been fully performed at that time and, hence, that a contractor would be unable at that time to tell how much his total costs had been increased as a result of compliance with the National Industrial Recovery Act, and so, the alternative provision was inserted for presentation of the claim within six months from the time the contract was completed. We can think of no reason for the alternative provision other than that we have suggested.

If this was the reason, then it was intended that the statute should begin to run not later than six months from the time the contractor completed its contract. When the defendant paid the contractor would be immaterial, because it seems Congress intended the statute to begin to run at the time the contractor was able to compute its excess costs, and the time of payment would have nothing to do with this.

In *Douglas Aircraft Construction Co.* v. *United States*, 95 C. Cls. 745, 759, we held the statute began to run when the contractor had fully discharged the contractual obligation imposed upon it; we reaffirm that holding.

The findings of fact, which are based upon a stipulation of facts by the parties, show that the plaintiff fully performed its contract of May 17, 1933, on October 9, 1934.[1] Claim was not filed until April 26, 1935, more than six months after the passage of the Act and after plaintiff had fully performed its contract.

Warrant in settlement of the amount due was not mailed before October 20, 1934, but this delay could not in any way have delayed plaintiff in the filing of its claim for increased costs incurred as a result of compliance with the National Industrial Recovery Act.

Since we think it immaterial, we do not determine when payment was made of the amount due on the contract, whether at the time the settlement warrant was received by plaintiff or when this warrant was paid. On this point, however, see *Wardwell* v. *United States*, 32 C. Cls. 30, 172 U. S. 48; *McKnight* v. *United States*, 13 C. Cls. 292, 98 U. S. 179; *Downey* v. *Hicks*, 14 Howard, 240, 249; 21 R. C. L. 27, 60, 61, 65; 23 R. C. L. 1384, 1385.

We are of opinion plaintiff did not file its claim within the statutory limit and, therefore, that we have no jurisdiction of its suit. Its petition will be dismissed. It is so ordered.

MADDEN, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

[1] After the last order was received under the contract, which expired June 30, 1934, plaintiff had on hand a number of desks, which it succeeded in selling the defendant on or about October 29, 1934, and October 30, 1934, but plaintiff does not contend in its brief that these shipments were made under the contract of May 17, 1933. The last shipment under that contract was made October 9, 1934.

GERLACH LIVE STOCK COMPANY v. THE UNITED STATES

[No. 46009. Decided October 2, 1944]

On Defendant's Demurrer

Condemnation of property; taking of riparian rights for the purpose of irrigation.—A landowner's rights in a navigable stream are subject to the paramount right of the Government to take whatever

steps it deems necessary in the improvement of navigation but the Government has no such right as to the waters of a stream for irrigation purposes. Cf. *Horstmann Co.* v. *United States*, 257 U. S. 138.

Same; jurisdiction.—In the instant case it is *held* that plaintiff is not suing for damages to its land consequential upon the destruction of its riparian rights but for the taking of a right which plaintiff had to use the water of the river, which is a property right, for the taking of which the owner may sue in the Court of Claims for just compensation. *Yates* v. *Milwaukee*, 10 Wallace 497, 504, cited.

Same; construction of "Friant Dam" for irrigation only.—The several Acts of Congress authorizing the construction of the Central Valley projects, of which the "Friant Dam" was a part and the engineering reports to which these Acts refer, all show that a part of the purpose of the entire project was to aid navigation; but that the construction of the "Friant Dam" only had no relation whatever to navigation and was solely for the purpose of irrigation.

Mr. Edward F. Treadwell for the plaintiff. *Messrs. Treadwell & Laughlin* were on the brief.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff, as the owner of certain lands described in its petition which were riparian to the San Joaquin River, sues to recover the value of its water rights in said river of which it alleges it has been deprived by the erection of the Friant Dam. It alleges that as the owner of said lands it was entitled to the use of the waters of the San Joaquin River for irrigation, for the watering of stock, and for domestic purposes, but that in derogation of those rights, the defendant by the construction of the Friant Dam, completed on October 20, 1941, has completely diverted all of the waters of the San Joaquin River from plaintiff's lands and has conveyed them through canals to certain other lands non-riparian to said river; that the value of these water rights was $14,760; that this amount has been deposited by the defendant in escrow, to be paid to Miller & Lux, Inc., unless plaintiff establishes its right to it by suit in this court. The claim of Miller &

Lux, Inc., is founded on a reservation in the deed from it to plaintiff's grantor, in which it was recited that the conveyance of the lands are subject "to the water rights of the grantor * * * whether such water rights be riparian, appropriative, or prescriptive * * * including the right to contract for or permit storage on the upper reaches of the San Joaquin River * * *. This covenant and condition shall not be construed as an extinguishment of the riparian rights of the land herein conveyed, but as an estoppel in favor of the grantor * * * against the grantee * * * to the extent herein provided."

The demurrer, however, is not grounded on this conflict in interest; its sole ground is that plaintiff's petition "fails to allege a taking of plaintiff's property or property rights within the meaning of the Fifth Amendment to the Constitution; that such damages as are alleged are indirect, consequential and not within the jurisdiction of the court."

Defendant says that its purpose in erecting this dam was not only to irrigate certain arid lands, but was also done for the purpose of flood control, and, hence, in aid of navigation; and, therefore, that defendant is not liable for any resulting injury to plaintiff's riparian rights. It relies, among others, upon the cases of *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; *Sanguinetti* v. *United States*, 264 U. S. 146; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508.

This proposition of law may be conceded; but plaintiff's petition alleges that the purpose in the erection of this dam was not to aid navigation, but solely to irrigate certain arid lands. If this is true, we think the defendant is liable for the taking of whatever riparian rights plaintiff had in the water of this river. A landowner's rights in a navigable stream are subject to the paramount right of the Government to take whatever steps it deems necessary in the improvement of navigation; but the Government has no such right in the waters of a stream for irrigation purposes. Cf. *Horstmann Co.* v. *United States*, 257 U. S. 138. Certainly it has

not the right to take the water away from one man and sell it to another without compensating the man deprived of it. Plaintiff's riparian rights in this stream, if any, was a property right, of which it cannot be deprived without being paid just compensation.

However, defendant says the plaintiff's land has not been taken, but has only been damaged by the destruction of its riparian rights, and that this court has jurisdiction only of a suit for a taking of land and not for damages to it. We do not think this is a suit for damages to land; it is one for the taking of a right plaintiff had to use the water of this river. This is a property right, for the taking of which the owner is entitled to just compensation. *Yates* v. *Milwaukee*, 10 Wallace 497, 504. In this case the Supreme Court said:

> This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.

See also *Kaukauna Co.* v. *Green Bay, etc., Canal*, 142 U. S. 254; *United States* v. *Cress*, 243 U. S. 316; *Willow River Power Co.* v. *United States*, No. 45067, decided February 7, 1944. Cf. *Horstmann Co.* v. *United States*, 257 U. S. 138.

But the defendant says that the Acts of Congress authorizing the construction of this dam and the reports to which they refer show that a part of the purpose was to aid navigation, and that on the demurrer we must take those Acts into consideration as well as the allegations of plaintiff's petition.

It is said that this project was originally authorized by the Act of August 30, 1935 (c. 831, 49 Stat. 1028, at page 1038.) Section 1 of this Act provides in part as follows:

> That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the respective reports hereinafter designated and subject to the conditions set forth in such documents. * * *

Syllabus

At page 1038 there is listed "San Joaquin River and Stockton Channel, and Suisan Bay, California; Report of Chief of Engineers dated June 10, 1933." An examination of that report shows, however, that no reference was made to the Friant Dam or to any improvement of the San Joaquin River above Stockton, which place is many miles below plaintiff's lands and the Friant Dam.

The work was done under the power conferred on the President by the Emergency Relief Appropriation Act of 1935, approved on April 8, 1935 (c. 48, 49 Stat. 115), and the Reclamation Act of June 17, 1902 (32 Stat. 388), as amended, as shown by the report of the Secretary of the Interior dated November 26, 1935, quoted in part in footnote 1 on the following pages.

The Act of June 17, 1902, *supra*, provided for the use of the proceeds from the sale and disposal of certain public lands for the construction and maintenance of irrigation works, and for the storage, diversion and development of waters for the reclamation of arid and semiarid lands. The Act of June 25, 1910 (36 Stat. 835), authorized the transfer to the reclamation fund created by the Act of June 17, 1902, *supra*, of a sum not to exceed $20,000,000, and the Emergency Relief Appropriation Act of 1935, *supra*, authorized the expenditure of $500,000,000 of the sums thereby appropriated for "rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion, and irrigation and reclamation."

Section 4 of the Act of June 25, 1910 provided in part:

> * * * and hereafter no irrigation project contemplated by said Act of June seventeenth, nineteen hundred and two, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States.

The Secretary's report, referred to above, was made in compliance with the requirements of this section, and of a similar section in the Act of December 5, 1924 (43 Stat. 672, 702), as it states.

The Reclamation Acts have nothing to do with navigation; they provide for the irrigation of arid and semiarid lands.

However, some features of the Central Valley project, of which the construction of the Friant Dam was a part, did have as a part of their purpose certain aids to navigation, but it will be seen from reading the report of the Secretary of the Interior that the construction of the Friant Dam had no relation whatever to navigation, but was solely for the purpose of irrigation. Indeed, this dam completely diverted from the Channel of the San Joaquin River all waters above the dam.

This Central Valley project, as is shown by the report of the Secretary of the Interior, contemplated the construction of the Kennett Dam on the Sacramento River, for the Friant Dam on the San Joaquin River, for the construction of the San Joaquin Pumping System, and for the construction of several canals. The Kennett Dam on the Sacramento River was designed to conserve water, to generate electric power, and to aid navigation; the Friant Dam and canals were solely designed to furnish water to irrigate lands in the northern part of San Joaquin Valley; and the San Joaquin Pumping System was for the purpose of pumping water from the Kennett Reservoir on the Sacramento River to the San Joaquin River to replace the water diverted by the Friant Dam and canals. The latter part of the project, however, was abandoned. (Report of Chief of Engineers, dated April 6, 1934, Rivers and Harbors Document No. 35, 73rd Congress, 2nd Session, and Act of August 26, 1937 (50 Stat. 844).) Pertinent parts of the Secretary's report are copied in the footnote [1] below.

[1] The Central Valley project embodies a plan for the conservation, regulation, distribution and utilization of the water resources of the Sacramento and San Joaquin rivers to provide urgently needed water supplies for existing agricultural, industrial and municipal developments in the Sacramento and San Joaquin valleys and upper San Francisco Bay region which contain 3,000,000 acres of settled irrigated and productive land, and a population of 900,000 persons. In addition to providing new water supplies to meet serious problems of water shortage, the project contemplates the restoration of commercial navigation on the upper Sacramento River, increased flood protection for the valley lands, and incidentally the generation of about a billion and a half kilowatt hours annually of hydroelectric energy.

The key unit of the project is Kennett Reservoir on the Sacramento River. A dam 420 feet high will regulate floods and store three million acre-feet of water. Water released from the reservoir, after generating hydroelectric power, will flow down the Sacramento River, maintaining adequate depths for navigation and furnishing ample supplies for irrigation, municipal and industrial use

But the defendant says Congress in the Act of August 26, 1937 (c. 832, 50 Stat. 844), expressly stated that the entire Central Valley project was for the purpose of improving navigation, among other things. The Act does say that the "entire Central Valley project * * * [is] declared to be for the purposes of improving navigation" etc.; but we do not understand Congress to have meant, the entire project and each integral part thereof. Such a statement would fly in the face of uncontroverted facts. The Friant Dam could not have been intended to improve navigation, since it took all of the water out of the river. Boats do not navigate over a dry riverbed. The San Joaquin Pumping System and the Kennett Dam on the Sacramento River were intended, in part, to improve navigation on the San Joaquin River, and when we look at the "entire" project, that is, the project as a whole, it is fair to say that one of its purposes was to improve navigation; but if we look at the construction of the Friant Dam alone, not supplemented by the San

along the main river and in the fertile delta region of the Sacramento and San Joaqin rivers. Intrusion of salt water from the bay into the delta channels—a frequent occurrence in recent years, causing substantial loss in crops and threatening destruction of productivity—will be prevented by the released waters. In addition water supplies will be made available in the delta channels for various uses in the nearby upper San Francisco Bay area, and for utilization in the San Joaquin Valley. Conduits to carry the supplies to these areas are provided. The supply for the San Joaquin Valley will be conveyed up the San Joaquin River through a series of pumping plants and intervening natural and artificial channels a distance of 150 miles, lifting the water to an elevation of 160 feet above sea level. This water will replace San Joaquin River water now used for irrigation in the northern San Joaquin Valley, thus permitting the entire flow of the San Joaquin River to be regulated in Friant Reservoir—the second storage unit of the project—and to be utilized in the southern San Joaquin Valley where local supplies are deficient. Water from this reservoir will be delivered by gravity through conduits extending northerly and southerly to serve developed irrigated lands in an area extending from Madera County on the north to Kern County on the south.

* * * * *

Friant Reservoir.—A dam, 250 feet high, will be constructed on San Joaquin River, which will store 400,000 acre-feet of water, which will permit the diversion of San Joaquin River water southward at elevation 467 feet. One and one-half million acre-feet annually on the average will be available for transmission from the reservoir through the means of the San Joaquin River Pumping System and the purchase of water rights in the San Joaquin River.

Friant-Kern Canal.—The Friant-Kern Canal will extend from Friant Reservoir to Kern River, a distance of 157 miles and will be capable of serving an area of 1,000,000 acres of developed land.

Madera Canal.—The Madera Canal, maximum capacity 1500 second-feet, will extend from Friant Reservoir to Chowchilla River, a distance of 35 miles, and will be capable of furnishing irrigation water to an area of 140,000 acres.

Joaquin Pumping System, it is impossible to say it was intended to improve navigation, and we do not think Congress meant to say it was. Section 2 of the Act of August 26, 1937, *supra*, is quoted in part in the footnote [2] below.

There is nothing in the Acts nor in the documents referred to that negative the allegation of plaintiff's petition that the purpose of the construction of this dam was solely to irrigate certain nonriparian lands. If this be true, and if the waters of this river have been diverted from plaintiff's lands, as alleged, there has been a taking under the Fifth Amendment.

Certainly the Bureau of Reclamation thought there had been a taking for it deposited in escrow the value of the rights taken, to be paid to the person entitled thereto.

Defendant's demurrer must be overruled. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

[2] * * * *Provided further,* That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes; *Provided, further,* That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals * * * and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, * * * under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further,* That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.

EVERETT D. GOTHWAITE, TRADING AS E. D. GOTHWAITE, AND AS THE NATIONAL HEATING COMPANY, MANASSAS, VIRGINIA, v. THE UNITED STATES

[No. 46080. Decided October 2, 1944]

On Defendant's Demurrer

Government contract; defendant not liable for delays caused by its acts as sovereign.—The Government is not liable for delays in performance of contracts caused by the exercise of its general and public acts as a sovereign. *Horowitz* v. *United States*, 58 C. Cls. 189; 267 U. S. 458, cited.

Same; defendant not liable for delays due to allocation of essential war materials by War Production Board.—The War Production Board is an agency created by the President and engaged in carrying out the powers conferred upon him by Congress in the Second War Powers Act of March 27, 1942 (56 Stat. 176, 178), under which the President was empowered to allocate materials essential to the national defense and to give priority in the obtaining of such materials to contractors engaged in work connected with the national defense. The defendant is not liable for delays due to the lawful exercise of the powers of this board.

Mr. John A. K. Donovan, for the plaintiff. *Messrs. Brown, Donovan, and Turnbull* were on the briefs.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Saul R. Gamer* was on the brief.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This suit is before us on defendant's demurrer to plaintiff's petition. Plaintiff alleges that on April 10, 1942, he entered into a contract with defendant to construct for the Veterans' Administration "certain outside heating, water and sewer services" at Fort Howard, Maryland. He sues for damages incurred as the result of delays due to the regulations of the War Production Board, which he says prevented him from securing necessary materials when needed.

The defendant demurs because it says the petition does not state a cause of action. It says the defendant is not liable for delays in the performance of contracts caused by the exercise of its general and public acts as a sovereign.

Defendant is clearly correct. The War Production Board is an agency created by the President and engaged in carrying out the powers conferred upon him by Congress in the Second War Powers Act of March 27, 1942 (56 Stat. 176, 178). Under that Act the President was empowered to allocate materials essential to the national defense and to give priority in the obtaining of such materials to contractors engaged in work connected with the national defense. He was expressly authorized to exercise these powers through an agency appointed by him.

This was an Act of a general and public character affecting all persons situated similarly to plaintiff. It authorized the exercise of sovereign powers in the defense of the nation. That the Government is not liable for such acts needs no argument. We have so held from the creation of this court. *Deming* v. *United States*, 1 C. Cls. 190; *Jones* v. *United States*, 1 C. Cls. 383; *Wilson* v. *United States*, 11 C. Cls. 513; *Horowitz* v. *United States*, 58 C. Cls. 189.

In the *Horowitz* case the defendant had sold plaintiff some silk, but could not ship it when promised because of an embargo placed on shipments of silk by the Railroad Administration. We held plaintiff was not entitled to recover damages for a decline in the market before the goods arrived. This was approved by the Supreme Court in an opinion reported in 267 U. S. 458. At page 461 the Supreme Court cited our decisions cited above, and quoted with approval from our opinion in the *Jones* case as follows:

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. * * * In this court the United States appear simply as contractors; and they are to be held

Syllabus

liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.

Plaintiff is not entitled to recover. His petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ULDRIC THOMPSON, JR. v. THE UNITED STATES

[No. 42837. Decided December 4, 1944]

On the Proofs

Patent for boring mechanism, No. 1,238,362; infringement; lack of invention.—In a suit for infringement of patent No. 1,238,362, directed to boring mechanism which, while not limited to such use, is particularly adapted to boring recesses in the explosive filler in high-explosive shells, it is *held* that the claims of the patent, known as plaintiff's apparatus patent, are invalid for lack of invention, and plaintiff is not entitled to recover.

Same; anticipation.—Claims 6 and 7 of plaintiff's patent No. 1,238,362, were anticipated by the patent to Goell, No. 2,009, described as "machines for boring war-rockets", as well as by the Gladeck drilling machine, built and used in the Government arsenal at Frankford.

Same; differences between Goell machine and plaintiff's unimportant.—Where in the Goell machine the stock moved to the machine, instead of the drill moving to the stock, as in the plaintiff's machine, the difference is of no importance. *Duner Co.* v. *Grand Rapids Ry. Co.*, 171 Fed. 863, and other authorities there cited.

Same; anticipation.—Claim 1 of plaintiff's patent No. 1,238,362, providing for the positioning of the "stock" to the desired location by the turning of a threaded stop, was anticipated by the patents Nos. 1,200,046 and 1,200,047 to A. M. Thompson.

Method patent, No. 1,255,836; claims 1, 4, 8 and 10 invalid.—In a suit for infringement of patent No. 1,255,836, a method patent directed to a method of forming recesses in the explosive filler in high-explosive shells, it is *held* that claims 1, 4, 8 and 10

are invalid because anticipated or lacking in invention, and plaintiff is not entitled to recover.

Same; failure to file timely disclaimer.—Where the applicable statutes (U. S. Code, Title 35, sections 65 and 71) permit a patentee in certain situations to save the good portion of his patent by a disclaimer of those parts of his patent as to which he was not the inventor; and where it is provided that the patentee may not maintain a suit on his patent "if he has unreasonably neglected or delayed to enter a disclaimer" (section 71); and where in the instant case more than 20 years have elapsed since a court decision (289 Fed. 594) pursuant to which a patent was issued to Stillwell covering several of the claims of plaintiff's method patent, and plaintiff has filed no disclaimer nor has he or any assignee of plaintiff brought suit under the provisions of section 66; it is *held* that the plaintiff's method patent (No. 1,255,836) is invalid as to all of its claims for failure to file a disclaimer within a reasonable time. *Marconi Wireless Co.* v. *United States*, 320 U. S. 1, 57.

The Reporter's statement of the case:

Mr. William S. Hodges for the plaintiff. *Messrs. Kingman Brewster* and *O. R. Folsom-Jones* were on the briefs.

Mr. H. L. Godfrey, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. F. Mothershead* was on the brief.

The court made special findings of fact as follows:

1. This is a patent suit alleging infringement of two United States Letters Patent to Uldric Thompson, Jr. The suit is brought under a special act of Congress (Private No. 424, 73rd Congress) enacted by the Seventy-Third Congress and approved June 27, 1934. The act reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States, notwithstanding the lapse of time or the statute of limitations, to hear, determine, and render judgment under the Act of July 1, 1918 (40 Stat. L. ch. 114, pp. 704, 705), on the claims of Uldric Thompson, Junior, for the use of or the manufacture by the United States without license of the owner thereof or the lawful right to use or manufacture war material under certain inventions of said Uldric Thompson, Junior, described in or covered by Letters

> Patent Numbered 1237362 and 1255836, respectively: *Provided*, That the records of the War Department as to such manufacture and use under these patents shall be available to the court and to the claimant: *Provided further*, That from any decision in any suit prosecuted under the authority of this Act an appeal may be taken by either party as is provided for by law in other cases.

2. Patent number 1237362 included in the above act with reference to certain inventions of Uldric Thompson is erroneous in so far as the digit 7 is concerned. United States letters patent 1237362 is a patent issued to a William Meyer, of Chicago, Illinois, for Protecting Means for X-ray Tubes and the Like and is not an invention of Uldric Thompson relating to the use or manufacture of war material, the Uldric Thompson patent being numbered 1238362 instead of 1237362. The reports of the Committee on Military Affairs of the House of Representatives and the Senate Committee on Claims both contain a reference to letters patent 1238362 issued to Uldric Thompson. Copies of these reports, plaintiff's Exhibits 17 and 17–A, are made a part of this finding by reference.

3. The two Thompson patents in suit are as follows:

> No. 1,238,362, application filed November 20, 1916; issued August 28, 1917.
> No. 1,255,836, application filed August 27, 1917; issued February 5, 1918.

The first patent is directed to a mechanical structure and will hereinafter be referred to as the apparatus patent, and the second patent, which is a division of the apparatus patent, is for a method, and will hereinafter be referred to as the method patent. The apparatus patent is directed to boring mechanism which, while not limited to such use, is particularly adapted to boring recesses in the explosive filler in high-explosive shells. The method patent relates to a method of forming recesses in the explosive filler in high-explosive shells.

Copies of the two patents in suit, plaintiff's Exhibits 1 and 2, respectively, and copies of the Patent Office file wrappers and contents thereof of the two applications which matured into the two patents in suit, defendant's Exhibits 42 and 43, are made a part of this finding by reference.

4. The apparatus patent was issued to the inventor, Thompson, plaintiff in the present case, on August 28, 1917. On September 18, 1917, Thompson assigned the entire right, title and interest of the apparatus patent, and the divisional application which subsequently matured into the method patent, to Bertron, Griscom & Company, of New York. The assignment, which was recorded in the United States Patent Office, was as follows:

> *Whereas* I, ULDRIC THOMPSON, JR., of the City, County, and State of New York, have invented certain improvements in
>
> BORING APPARATUS
>
> for which United States patent #1,238,362 was issued to me on August 28th, 1917, and also improvements in
>
> METHOD OF FORMING CAVITIES IN EXPLOSIVES
>
> for which I have made application for Letters Patent of the United States, said application having been filed on August 27th, 1917, and bearing Serial Number #188,382, and
>
> *Whereas*, BERTRON, GRISCOM & Co., a Copartnership consisting of S. Reading Bertron, Rodman E. Griscom, Francis T. Homer, Marshall J. Dodge, Murray W. Dodge, Wm. L. Sexton, and John A. Cauldwell, and having a place of business in the City, County and State of New York, is desirous of acquiring the said patent and invention and all Letters Patent issued thereon and also all additions to or improvements on the inventions of said patent and application, which I may hereafter invent, as well as all rights which I now have by reason of past infringement of said patent:
>
> *Now, therefore, this indenture witnesseth*, That for and in consideration of Five ($5.00) Dollars, the receipt of which is hereby acknowledged, I, the said Uldric Thompson, Jr., do hereby sell, assign, transfer and set over unto the said Bertron, Griscom & Co., its successors and assigns, the entire right, title and interest in, to and under the said patent #1,238,362 and in, to and under the said invention as described in the specification of said application for Letters Patent, Serial Number #188,382, any and all Letters Patent which may be issued thereon, together with all additions to or improvements on the inventions of said patent and application which I may hereafter invent, and all rights which I now have by reason of past infringement of said patent.

And I hereby request the Commissioner of Patents to issue any and all Letters Patent, which may be issued on said application Serial Number #188,382, to the assignee, for its interest, for the sole use and behoof of said Bertron, Griscom & Co., its successors, assigns and legal representatives.

5. At the time of the execution of the assignment referred to in finding 4, plaintiff, Uldric Thompson, entered into an agreement with Bertron, Griscom & Company, the substance of which was that they were to finance and exploit the patents, employ counsel and collect royalties, turning over to Thompson a percentage of the profits. The original letter outlining the agreement of the relationship existing between the parties, signed September 18, 1917, has been lost. A copy of the letter, plaintiff's exhibit 16, reads as follows:

We beg to acknowledge as Trustee for yourself, Goethals, Jamieson, Houston & Jay, Inc., and ourselves, your assignment to us of all your rights to the United States Patent #1,238,362 on Boring Apparatus, issued August 28th, 1917, and other inventions as shown in the attached assignment.

2nd.—We are holding as Trustee this Patent and other and subsequent patents as shown in attached assignment, in which you have an interest of 40%, Goethals, Jamieson, Houston & Jay, Inc. 30%, and ourselves, 30%, and we agree to account to the members of the Trust for all moneys expended or received in connection with this business in proportions as above stated.

3d.—We agree to advance from time to time moneys necessary to employ Counsel, obtain such foreign patents as you, Mr. Jay, and ourselves deem it advisable, and to provide expenses necessary in connection with either the infringing of these patents, royalties mutually agreeable, or for the sale of the patents at a price to be mutually agreed upon. Should you not approve of a price for the patents which we consider reasonable and which the other parties to the Trust consider reasonable, we and yourself will select an arbitrator whose decision shall be final.

4th.—It is proposed to retain the services of Thomas Howe, Esq., who, in addition to a reasonable retainer, is to receive a contingent fee of 5% of the royalties collected or 5% of any sale price.

5th.—If Goethals, Jamieson, Houston & Jay, Inc. and Messrs. Bertron, Griscom & Co. should decide at any time within two years from this date to withdraw from

this business, then the patents assigned to us as Trustee are to be reassigned to you, you then undertaking to reimburse us for any advances made, out of the proceeds of the first moneys received by you, either due to collection of royalties or the sale of the patents.

6th.—During the continuance of this business, the receipts either from royalties or the sale of the patents shall first be devoted to liquidating the amounts advanced by ourselves, and then divided in proportion to the interests above stated.

6. December 28, 1917, Bertron, Griscom & Company entered into a license agreement with the United States in which the latter acquired the license to manufacture nine boring machines under Thompson patent 1,238,362 and to use them at Rock Island Arsenal, Rock Island, Illinois. The license agreement was as follows:

THIS LICENSE AND AGREEMENT entered into this twenty-eighth day of December 1917 between S. Reading Bertron, Rodman E. Griscom, Francis T. Homer, Marshall J. Dodge, Murray W. Dodge, Wm. L. Sexton, and John A. Cauldwell, a co-partnership doing business as Bertron, Griscom & Co., of 40 Wall Street, City of New York, State of New York, of the first part, and the United States of America by the Commanding Officer of Rock Island Arsenal, Rock Island, Illinois, acting by authority of the Secretary of War, of the second part, witnesseth:

Whereas, The party of the first part is the sole owner of United States Letters Patent No. 1,238,362, for Boring Apparatus, granted on the twenty-eighth day of August 1917 and

Whereas, The party of the second part is desirous of acquiring a license to manufacture in accordance with said Letters Patent, nine (9) Boring Machines for forming detonator cavities in high explosive shells and to use the same in the manufacture of shells in its Artillery Ammunition Assembling Plant at the Rock Island Arsenal, Rock Island, Illinois, and

Whereas, The party of the first part is willing to grant a license under said patent to the party of the second part upon the terms and conditions hereinafter stated:

Now, therefore, The parties hereto have mutually agreed as follows:

ARTICLE 1. In consideration of the payment of the sum of One Dollar ($1.00) by the party of the second

part to the party of the first part, and of the terms and conditions set forth in the following Articles, the party of the first part agrees to grant and hereby does grant unto the party of the second part a license to manufacture nine (9) Boring Machines for forming detonator cavities in high explosive shells in accordance with the aforesaid Letters Patent No. 1,238,362, and to use the said machines in the manufacture of high explosive shells at Rock Island Arsenal, Rock Island, Illinois, during the period of the war.

ARTICLE 2. The party of the second part further agrees to mark each of the said (9) Boring Machines with the word "Patented" and date of the grant of the said patent No. 1,238,362.

ARTICLE 3. It is understood and agreed that nothing herein shall be considered as a waiver by the party of the first part of any of its rights to compensation for the manufacture, use or sale of apparatus (except nine machines as above stated) in accordance with said patent No. 1,238,362 by others than the Government of the United States nor of the rights of said others to reimbursement by said Government for the payment of said compensation, nor of any rights whatsoever except as stated in Article 1 hereof.

Nine machines were installed at Rock Island Arsenal from a date subsequent to January 1918 until 1920, during which year they were shipped to Picatinny Arsenal. At least one of these machines was marked in accordance with the license agreement, bearing a plate having the legend, "Patented August 28, 1917."

7. January 9, 1918, Bertron, Griscom & Company, as a copartnership, executed an assignment of the Thompson apparatus patent and the Thompson application then pending, to Bertron, Griscom & Company, Inc., a corporation. The Thompson method patent application, serial number 188,382, when it matured into a patent on February 5, 1918, was issued to Bertron, Griscom & Company, Inc., in accordance with that assignment.

8. On September 13, 1934, Bertron, Griscom & Company, Inc., executed an assignment in which they assigned to Uldric Thompson, Jr., the entire right, title and interest in both the Thompson apparatus and method patents, Nos. 1,238,362 and 1,255,836. The pertinent portion of this assignment,

which was recorded in the United States Patent Office, was as follows:

Now, therefore, witnesseth, in consideration of the sum of Five Dollars ($5.00), receipt of which is hereby acknowledged, and other good and valuable consideration, Bertron, Griscom & Co., Inc., a corporation, has sold, assigned, transferred and set over unto the said Uldric Thompson, Jr., the said party of the second part, his successors and assigns, the entire right, title and interest of every name and nature, in, to and under United States Letters Patent numbers 1,238,362 and 1,255,836, and any and all letters patent which have or may be issued thereon, together with all additions to or improvements on the inventions covered by said patents, which have or may be hereafter invented, and all rights which it now has or holds by reason of past, present and future infringement of said patents, and by these presents does forever save and hold harmless the said party of the second part for any assignment of any interests of said Letters Patent heretofore or hereafter made by the said party of the first part, including any assignment of interests to Goethals, Jamieson, Houston & Jay, Inc., a corporation and/or George W. Goethals & Co., Inc., a corporation.

Signed, Sealed and delivered this 13th day of September A. D. 1934.

The assignment as recorded contained a certification under the corporate seal of the corporation authorizing and empowering S. R. Bertron, President of the corporation, to execute the assignment to Uldric Thompson, Jr.

The apparatus patent expired August 28, 1934, and the method patent expired February 5, 1935.

LOADING OF HIGH-EXPLOSIVE SHELLS

9. A high-explosive shell consists of a steel shell casing filled with a high explosive, such as T. N. T. or amatol, a booster and a fuse mechanism. The booster is a charge of detonating explosive contained in an inner casing adapted to fit within a cylindrical recess left or drilled in the main charge of explosive. The booster charge is ignited by the fuse and in turn detonates the main charge of explosive in the shell.

Explosive shells are either nose fused or base fused. Armor piercing shells are base fused. In nose fused shells the booster cavity or recess in the explosive charge of T. N. T. is at the nose end of the shell, there being a threaded opening in the steel casing at that end, into which the booster casing is screwed. In the base fused type, which is used for armor-piercing, the nose end of the shell is solid and the booster casing and its accompanying fuse structure are adapted to be screwed into a threaded opening at the rear or base end of the shell.

10. One method of filling a shell with explosive is by melting the explosive by heating it to a definite predetermined temperature and then pouring it while in a molten state into the shell casing through the nose or base opening. T. N. T. when heated to a temperature of 100° C., the temperature of boiling water, melts to a consistency proper for pouring. The booster cavity is made either by (1) forming or casting, or (2) by drilling. In making a booster cavity by forming or casting, the shell is filled with the melted explosive up to a point which corresponds to the bottom of the booster cavity. When this has solidified, a former is then inserted and additional melted T. N. T. is poured in to surround the former. In making the booster cavity by drilling, the shell is completely filled with melted T. N. T. or similar high explosive and after this has cooled and solidified, the cylindrical booster cavity is then drilled out by a conventional drill of the proper diameter. The latter method of making the booster cavity is involved in the present suit.

11. The cylindrical booster cavity should be concentric with the screw threads by means of which the booster is to be held in place in the shell, and as small a clearance as possible should be left between the walls of the booster cavity in the explosive and the booster casing which is inserted therein. Minimum clearance or tolerance between the explosive filler and the booster casing results in a more effective detonation and better fragmentation of the shell, and in the case of base fused shells too much clearance or a void occurring between the explosive filler and the booster casing may be dangerous in that at the instant of firing the shell from a gun the ex-

plosive charge may be jolted back so sharply against the booster casing that a premature explosion of the shell in the gun may occur. It is therefore essential that the booster cavity be formed as accurately as possible.

12. High explosives such as T. N. T. and amatol customarily require a relatively heavy shock to cause them to detonate. Sensitivity to shock however increases with the temperature. Friction such as caused by a drilling operation will cause local heating in the explosive. T. N. T. and similar explosives can be ignited by a flame or spark, particularly when in the form of shavings, fine particles, or dust. When ignited, T. N. T. may burn violently, and if it is burning in a confined state it may explode or even detonate because of the excessive temperatures and pressures generated.

In order to prevent fires and explosions in T. N. T. loading plants certain conventional safety precautions are taken. These include searching of the employees for matches; having the employees wear rubber or wooden-pegged shoes during their work period, and providing barriers of concrete or metal behind which the employees stand while operating certain machines and devices.

13. T. N. T., particularly in the form of vapor or dust, may be absorbed into the skin or breathed into the lungs of persons employed in a loading plant and may cause what is known as T. N. T. poisoning. The extent of the resulting harm depends upon the degree of absorption as well as the physical resistance of the individual.

THE PATENTS IN SUIT

14. The preferred embodiment disclosed in the specification and drawings of the apparatus patent in suit No. 1,238,-362, is an inverted vertical boring machine or one in which the work or material to be bored is mounted in a holder located above a rotatable drill which is progressively raised by the operator as it bores into the material. The boring mechanism as shown in Fig. 5 of the apparatus patent in suit, which figure is reproduced herewith, consists of a vertical rotating shaft 1 which is capable of vertical axial movement

by means of a hand lever not shown. The upper limit to which the shaft and the associated drill at its upper end may be raised is governed by a stop, which also is not shown in this figure.

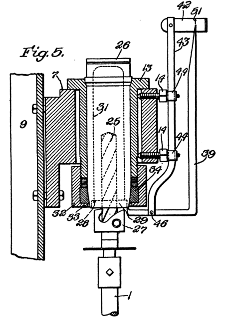


Fig. 5 of Thompson apparatus patent.

The shell 26 (in this instance, a nose fused shell) is supported in a tubular sleeve which is capable of precise lateral adjustment in the mounting head 7 in order to bring the fuse opening into accurate axial alinement with the boring tool. The nose of the inverted shell, which fits snugly into the tubular sleeve when placed in position, rests upon a

corresponding tapered member 34 and is supported thereby. This tapered holding member is capable of being adjusted upwardly or downwardly by means of a screw-threaded collar 32, this adjustment accurately determining the depth to which the boring tool will penetrate the T. N. T. or shell filler.

The short end of a pivoted index lever 39 directly engages the nose of the shell, and the correct position of the shell may therefore be accurately determined by the long index arm of this lever registering with an index mark 51.

The boring tool or drill is of two diameters, the longer or top portion being of the right size to provide the recess for the booster charge, and the lower portion being of larger diameter and of the right size to remove the T. N. T. or explosive from the threaded opening in the nose of the shell. The dimension of this larger portion of the boring tool is such that there will be a slight clearance between the interior portion of the threads of the shell casing and the boring tool so that a very thin ring of explosive material is left in the threads. This clearance is necessary in order that there may be no metal-to-metal contact during the drilling operation, which might cause an explosion. The ring of explosive left in the threads is broken out in a subsequent operation and the threads cleaned by means of a soft brass wire brush.

Once the machine has been set up and adjusted for a given size and type of shell, the shells may be readily slipped into place, the index lever giving a check as to the accurateness of the setting. The drilling operation can thus be performed with speed and accuracy.

15. The drilling operation taking place in an inverted position, the chips and dust resulting therefrom do not clog the drill but readily fall out into a cylindrical casing, not shown on Fig. 5 of the drawing. This casing, which surrounds the drill shaft below the nose of the shell, is connected with a suction pipe which removes all chips, dust and fumes from the drilling operation.

16. The claims in suit of the apparatus patent, No. 1,238,-362, are directed broadly to a boring apparatus for forming a recess in *stock* and are not limited to boring apparatus

solely for the purpose of drilling explosive material. None of the claims in suit are limited to the inverted boring structure, or to the double diametered drill. The claims are as follows:

1. Boring apparatus comprising a boring tool, means for reciprocating the boring tool with respect to the stock, a supporting member having an opening therethrough adapted to receive the stock at its rearward end, and a stop arranged to engage the stock at its forward end when the stock is disposed in said opening so that the stock is longitudinally positioned with respect to the path of reciprocation of the boring tool, the stop being threaded on the forward end of the supporting member so that it may be adjusted longitudinally of the path of reciprocation of the boring tool.

3. Boring apparatus for recessing a tubular member tapered at the forward end comprising a boring tool, means for reciprocating the boring tool along a fixed path with respect to the tubular member, a support for the tubular member, and a tubular stop for longitudinally positioning the tubular member with respect to the path of reciprocation of the boring member, the tubular stop having a tapered internal bore adapted to fit the tapered end of the tubular member.

4. Boring apparatus for recessing a tubular member tapered at the forward end comprising a boring tool, means for reciprocating the boring tool along a fixed path with respect to the tubular member, a support for the tubular member, and a tubular stop for longitudinally positioning the tubular member with respect to the path of reciprocation of the boring member, the tubular stop having a tapered internal bore adapted to fit the tapered end of the tubular member and having a threaded connection with the said support whereby the stop may be longitudinally positioned relatively to the path of reciprocation of the boring tool.

5. Boring apparatus for recessing a tubular member comprising a boring tool, means for reciprocating the boring tool along a fixed path, a supporting member having an opening adapted to receive the tubular member at its rearward end, a stop arranged to engage the forward end of the tubular member and thereby longitudinally position the tubular member with relation to the path of reciprocation of the boring tool, and means for centering the supporting member and the stop relatively to the boring tool.

6. Boring apparatus comprising a boring tool, means for reciprocating the boring tool along a fixed path, a guide having an opening in alinement with said path for laterally positioning the stock and means for at least partially supporting the stock and for positioning the stock longitudinally of said path.

7. Boring apparatus comprising a boring tool, means for reciprocating the boring tool along a fixed path, a guide having an opening in alinement with said path for laterally positioning the stock and means disposed forwardly of the guide in engagement with the forward end of the stock for at least partially supporting the stock and for positioning the stock longitudinally of said path.

11. Boring apparatus for accurately recessing stock to a given depth comprising a boring tool, means for reciprocating the boring tool along a fixed path, means for positioning the stock in alinement with said path, means engaging the stock at its forward end for positioning the stock longitudinally of said path, and means for indicating the longitudinal position of the stock.

14. Boring apparatus for accurately recessing stock a given depth comprising a boring tool, means for reciprocating the boring tool along a fixed path, means for supporting the stock, and an indicating lever pivotally mounted so that one end thereof engages the forward end of the stock and thereby indicates the longitudinal position of the stock with respect to the path of reciprocation of the boring tool.

17. The method patent, No. 1,255,836, was based on a division of the application which matured into the apparatus patent. The drawings are the same and the specification is also the same with the exception of a few minor variations in language.

18. The claims of the method patent which are involved in this suit are as follows:

1. The method of forming a cavity in explosive contained in a shell, which consists in supporting the shell with its axis having a vertical component whereby the borings tend to drop away from the shell under the action of gravity, and having its lower end open, and removing explosive material to form the desired cavity by relatively moving a drill and the shell whereby the drill enters into the explosive from the lower end of the shell along a path having a vertical component and con-

veying the borings of explosive away from the vicinity of the shell and drill by suction.

4. The method of forming a cavity in explosive contained in a shell, which consists in relatively moving the shell and a drill whereby the drill is entered into the explosive and limiting the penetration of the drill by the end of the shell at its mouth.

8. The method of forming a cavity in explosive cast in a shell having bores of different diameters, which consists in supporting the shell with its axis having a vertical component whereby borings released tend to drop away from the shell and having its lower end open, removing explosive material to form the desired cavity by advancing drills or cutters in longitudinally fixed relationship into the explosive from the lower end of the shell along a path having a vertical component, the said cutters or drills forming holes of different diameters and the hole in the larger bore being of a diameter not greater than the diameter of the smaller bore, and gaging the penetration of the drills or cutters into the explosive by reference to the forward end of the shell.

10. The method of forming a cavity in explosive contained in a shell which consists in supporting the shell with its axis having a vertical component, whereby explosive released tends to drop away from the shell, and having its lower end open, removing explosive material to form the desired cavity by relatively moving the shell and drills or cutters of different diameters and in longitudinally fixed relationship, whereby the said drills or cutters enter into the explosive from the lower, open end of the shell along a path having a vertical component and the boring of larger diameter is carried out simultaneously with a portion of the boring of smaller diameter and conveying the borings of explosive away from the vicinity of the shell and drill by suction.

19. The phrase occurring in three of the claims, "with its axis having a vertical component whereby the borings tend to drop away from the shell under the action of gravity," does not limit the claims to a method of boring in which the shell and boring tool are vertical. The meaning of this language is explained by the following paragraph taken from the specification:

It is to be understood that it is not essential to the method and that the apparatus herein disclosed need not be operated in precisely the position shown in the drawings, that is, in precisely a vertical position, but is of

utility when employed in any position wherein the opening in the shell is directed somewhat downwardly, that is in any position other than a horizontal position and other than a position in which the base of the shell is lower than the mouth of the shell. In order broadly to recite a position other than the two last mentioned positions, I have employed the expression "a fixed path having a vertical component," meaning by this a path other than one disposed horizontally.

20. Some time in August of 1915 Mr. Bermingham, General Manager of the International Steel & Ordnance Corporation of New Jersey, sent an employee of the corporation, Mr. St. Clair Smith, to New York City, relative to investigating various methods of loading shells with T. N. T. At a conference between Smith and plaintiff Thompson in New York City on August 27, 1915, Thompson showed Smith a pencil sketch in which were embodied certain features of the inventions which resulted in the subsequent issuance of the two Thompson patents in suit. This sketch, which was dated by Smith on August 27, 1915, is in evidence in this case as plaintiff's Exhibit 19 and is made a part of this finding by reference.

21. The machine disclosed in the sketch of August 27, 1915, comprised a shell holder mounted on the upper end of a vertical support. The shell holder included a plate at its lower end and was adapted to hold a shell in a vertical position above a drill member, the plate at the bottom end of the shell holder providing a rest for positioning the lower end of the shell with respect to the path of movement of the drill member. The drill member as disclosed had cutters of two different diameters, so that as the drill entered the interior of the shell at the shell's lower end the explosive material was cut away in two diameters. The bottom of the drill shaft was shown as being provided with a stop so that the depth of the double diametered hole, which was drilled in the explosive material, was predetermined.

The sketch, Exhibit 19, fails to disclose a threaded or adjustable stop in engagement with the shell; a stop having a tapered internal bore adapted to fit the tapered end of a shell; means for centering the shell with respect to the axis of movement of the drill; an indicating device for showing

the longitudinal position of the shell or suction means for removing the chips and dust resulting from the drill operation.

22. Shortly after the interview of August 27, 1915, plaintiff Thompson was employed as chief engineer at the Parlin plant of the International Steel & Ordnance Corporation at Parlin, New Jersey, his employment beginning on September 7, 1915. Thereafter and as a part of his employment Thompson began construction of a shell drilling machine in accordance with the drawing previously disclosed to Smith. The construction of the first machine was completed at Parlin, New Jersey, some time in the first part of November, 1915, the machine being used to drill a series of shells for experimental purposes on November 11, 1915. This machine had a shell holder constructed of laminated wood. A pencil record of tests of this drilling operation was made by Thompson on this date, this original pencil record being plaintiff's Exhibit 22, which is made a part of this finding by reference.

23. Some time during the year 1916 eight or ten drilling machines were completed and installed at the Parlin plant under the supervision of Thompson. They were used in loading operations on high-explosive shells for the Russian Government. These machines were constructed by a mechanic, Edward P. Brown, who came to Parlin in January 1916. The construction of these machines was similar to that of the machine disclosed in a drawing, plaintiff's Exhibit 7, which is substantially identical with the illustrations contained in the patents in suit.

A shop drawing, plaintiff's Exhibit 8, of these machines constructed in 1916 is similar to plaintiff's Exhibit 7 except that it shows a concrete barrier around the machine. Plaintiff's Exhibits 7 and 8 are made parts of this finding by reference.

Thompson's employment with the International Steel & Ordnance Corporation ceased in December of 1916.

24. The drawing, plaintiff's Exhibit 19, disclosed to Smith on August 27, 1915, establishes, as to claims here in suit, that date as the date of conception for claims 6 and 7 of the apparatus patent and claims 4 and 8 of the method patent. There is no satisfactory evidence of a date of conception or reduction to practice of the various details set

forth in the remaining claims in suit of either of the Thompson patents earlier than November 20, 1916, the filing date of the application which materialized into the apparent patent in suit.

Thompson claims to have used the adjustable threaded ring mount in the shell holder some time in May 1916, but this statement is not corroborated, and is not adequately proved.

25. After the issuance of the patents in suit to Thompson, the United States Patent Office initiated certain interference proceedings involving the Thompson method patent No. 1,255,836 and certain patent applications of Howard A. Stillwell. Two of the interferences were appealed from the Patent Office to the then Court of Appeals of the District of Columbia on March 16, 1923. That court decided in an opinion of May 7, 1923, 289 Fed. 594, that Thompson's date of conception and disclosure as to the subject-matter of claims 2, 3, 5, 6, 7 and 9 of the method patent was August 27, 1915, but that Stillwell's conception was prior to this date and Stillwell was the prior inventor of the subject-matter of those claims. Patent No. 1,522,153 on the interfering subject-matter was issued to Stillwell on January 6, 1925.

26. Neither plaintiff nor his assignees nor any person holding any interest under him have ever brought suit against Stillwell or against Stillwell's assignee, E. I. du Pont de Nemours & Company, either under 35 U. S. C. 66 or for alleged infringement of either of the patents here in suit, and neither plaintiff nor his assignees have ever brought suit against any one under either of the patents now in suit with the exception of the present case.

Neither plaintiff nor his assignees have ever filed in the United States Patent Office any disclaimer relating to the subject-matter concerning which priority was found in Stillwell by the decision of the then Court of Appeals of the District of Columbia.

THE ACT OF JULY 1, 1918

27. The act of July 1, 1918, referred to in the special act of Congress upon which the present suit is based (see find-

ing 1), authorizes a patent suit in the Court of Claims in the following language:

> * * * That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without the license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: * * *.

THE ALLEGED INFRINGING ACTS

28. Plaintiff claims that machines for boring detonator cavities in high-explosive shells, with such structure as to come within the terminology of the claims here in issue, were used either for or by the Government at the following places:

International Steel & Ordnance Corporation, Parlin, N. J.
Atlantic Loading Company, Old Bridge, N. J.
Evans Engineering Corporation, Old Bridge, N. J.
E. I. du Pont Company, Penniman, Va.
Picatinny Arsenal, Dover, N. J.

With the exception of Picatinny Arsenal, which is a Government plant, the other alleged uses listed by the plaintiff were by contractors for the Government.

INTERNATIONAL STEEL & ORDNANCE CORPORATION, PARLIN, NEW JERSEY

29. Plaintiff alleges, as to this plant, infringement of claims 1, 3, 4, 5, 11 and 14 of the apparatus patent and claims 1, 4, 8 and 10 of the method patent by the use of boring machines in the loading of shells for the United States. This is the plant where the plaintiff was employed as a chief engineer up to December of 1916 and at which during the course of his employment the machines disclosed in plaintiff's Exhibits 7 and 8 and in the patents in suit were developed and constructed. See findings 22 and 23.

The testimony as to the use of these machines on shells loaded under Government contracts and subsequent to July

1, 1918, is contradictory in character. Brown, who built the machines under the direction of Thompson, and Bermingham, for a time vice-president of the Gillespie interests, who owned the International Steel & Ordnance Corporation at Parlin, New Jersey, and who was also general manager of the latter company, testified from memory and approximately twenty years after the event, that the boring machines used at the Parlin plant were similar to those shown in plaintiff's Exhibits 7 and 8 and that they were used on Government contract work up to the time of the Armistice (November 11, 1918).

30. In November 1917 one William N. Lacey visited the Parlin plant under orders from the Commanding Officer of the Chief of Engineers, and while at the plant prepared a written memorandum as to the methods used at the loading plant, which contemporaneous memorandum was forwarded to the Ordnance Department. The portion of this memorandum relating to the drilling operation was as follows:

> Drilling of fuze sockets is not done within five hours after pouring. The shell is placed nose down, in a split cylinder of cast iron on a rotatable table. The cylinder is clamped shut, holding the shell by the rotating band and bourelet, nose resting on the iron table. The drill is fed upward from below the table by means of a long hand-lever pulled back in a horizontal direction. The drill shaft is fitted with a stop to regulate the depth of cut. Three men work on the operation, the first putting the shell in place and clamping, the second operating the drill and the third removing the shell and placing it on a conveyor. The rotatable table has three split cylinders mounted on it so that all three of the operators are at work at once. This type has replaced a number of similar drills for operation by one man from behind a barrier, the rotatable table being in that case unnecessary.

The drilling machine referred to as being replaced and which was operated by one man behind a barrier, fits the description of the boring machine disclosed in plaintiff's Exhibit 8 and the drawings of the patents in suit and alleged by plaintiff to have been used at this plant subsequent to July 1, 1918.

One H. T. Cummings, who had charge of a group of Government inspectors at various plants, visited the Parlin plant

from time to time and recalls from memory the turntable type of machine referred to in the Lacey memorandum. In the turntable type of machine a double-diametered drill was used and the shell was clamped tightly in a split cylindrical holder with the nose of the shell resting directly on the table. There was no vertical adjustment of the shell in the split holder with respect to the drill or holder and no indicating means was present or required to indicate the position of the shell with respect to the drill or the cylindrical holder. No suction means was used to remove the borings. The affidavit of Lacey (defendant's Exhibit 76–A) has been stipulated into the evidence and is made a part of this finding by reference.

It is not proved that a boring machine similar to the disclosure in the drawings and the patents in suit and plaintiff's Exhibit 8, was used in loading shells under Government contracts at the Parlin plant subsequent to July 1, 1918.

31. The alleged inventions here in suit were reduced to practice by Thompson while he was employed at the Parlin plant as chief engineer, and, in the reduction to practice and the building of the first machines, the tools, materials and facilities of the plant were used. See findings 22, 23.

There is no satisfactory evidence to negative the existence of an implied license for the use of the Thompson inventions at this plant or to show that the use at the Parlin plant of any shell-boring machines was without the authorization or consent of Thompson.

ATLANTIC LOADING COMPANY, OLD BRIDGE, N. J.—EVANS ENGINEERING CORPORATION, OLD BRIDGE, N. J.

32. At the Atlantic Loading Company and the Evans Engineering Corporation two types of drilling machines were used, viz., a vertical inverted type for small shells and a horizontal type for large shells. These machines are illustrated by drawings, plaintiffs Exhibits 10–A, 10–B, 10–C and 10–D, which are made a part of this finding by reference. These drawings were furnished in response to a call and carry upon them an original indorsement "Certified copy of drilling mach. used by Gov. contractor," and signed by W. E. Becker, Capt. Ord. Dept. U. S. A.

Plaintiff is not asserting any claim with regard to the horizontal type machines.

In the vertical type drilling apparatus shown in Exhibit 10–A, and used for small shells, the shell was supported in a holder consisting of two clamps hinged on a vertical axis and which were closed about the shell. The lower end of the shell was supported by a bottom plate having an opening therein, so that the shell projected slightly therethrough, with its axis vertical and in alinement with the path of movement of the drill. The drill was of the double-diametered type, and the depth of penetration of the drill was controlled by a stop member on the drill provided with rollers which came in contact with the lower end of the shell casing and thus prevented further penetration of the drill into the explosive. A conical hopper or cup was provided adjacent the lower end of the drill into which the borings fell, and a suction pipe was provided to remove the borings from this cup. The machine did not have either the indicating gauge operated by the shell when placed in the holder or the thread-centering collar device disclosed in the patents in suit.

33. Plaintiff in a motion for call on the War Department filed November 2, 1934, requested among other things the name and location of each manufacturer of high explosive ordnance material holding a contract with the United States for loading of the same since July 1, 1918. In response to this portion of the call the War Department in a reply filed with the court on May 20, 1935, listed among other contractors the following:

Atlantic Loading Co., Hammonton, N. J.:
526,903________________________ 75 m/m H. E. shell MkI.
13,106_________________________ 100 Demol. bomb. MkI.
Evans Eng. Corp., Old Bridge, N. J.:
1,018,002______________________________ 75 m/m C. R. shell.
206,650 _______________________________ 3" shell.

In addition to the response to the call, there is oral testimony that the Atlantic Loading Company and Evans Engineering Corporation were using the type of machine described in finding 32 in loading operations on shells for the United States Government subsequent to July 1, 1918, and up to one or two months after the Armistice.

34. The terminology of claims 6 and 7 of the apparatus patent and the terminology of claims 1, 4, 8 and 10 of the method patent are applicable to the vertical drilling machine used in the Atlantic Loading Company and Evans Engineering plants.

DU PONT ENGINEERING COMPANY, PENNIMAN, VIRGINIA

35. The use of drilling machines in shell loading operations at this plant is based upon the testimony of one witness, Charles E. Allard, who was employed at the du Pont plant from the latter part of 1917 until November 11, 1918, when shell loading operations ceased. Allard was employed to keep the drilling machines in repair. The type of drilling machine which he described from memory as being used in this plant is vaguely illustrated by a drawing, plaintiff's Exhibit 29. The origin of this drawing is unknown. Exhibit 29 is made a part of this finding by reference.

The machine described, so far as it is shown in the drawing, was of the vertical inverted type, having a fixed vertical drill spindle at the bottom which carried a double-diametered drill. In this machine the position of the drill was fixed and the drilling operation was carried out by the shell descending in a tubular casing against the rotating drill. The motion of the shell toward the drill during the drilling operation and its subsequent upward movement in the carrier were controlled by compressed air. There was some kind of an adapter placed on the nose of the shell prior to its insertion in the carrier which functioned to guide the shell, and the depth of penetration of the drill was controlled by the adapter coming to rest against a fixed stop located near the bottom of the tubular carrier.

Allard was unable to describe the details of the shell holder, how it was activated by motion of the compressed air, and the details of the mechanism which prevented the shell from rotating during the drilling operation. The drawing also fails to disclose these details.

The borings and dust from the shell drilling operation fell out by gravity through a pipe into a box set on the floor below the machine, and no suction device was used to remove them.

36. The response to the call referred to in finding 33 indicates the following contracts at the du Pont plant at Penniman, Virginia, subsequent to July 1, 1918:

du Pont Engineering Co., Penniman, Virginia:

337, 393	75 m/m C. S. H. E. shell.
11, 108	4.7" C. S. shell.
5, 142	5" Gun shell.
246, 211	155 m/m How. H. E. shell.
90, 000	155 m/m Gun shell.
909	6" Gun shell.
32, 057	8" Gun ammunition.
133, 700	8" How. H. E. shell.
54, 966	9.2" How. C. S. shell.
1, 640	240 m/m How. shell.

37. The machine used at this du Pont plant did not have means for reciprocating the boring tool along a fixed path or any threaded or adjustable stop for positioning the shell. The phraseology of none of the claims in issue, of the apparatus patent, is applicable to this structure.

The adapter which was fitted to the mouth of the shell and which contacted the fixed stop in the tubular carrier limited the penetration of the drill with reference to the forward end of the shell. The phraseology of claims 4 and 8 of the method patent is applicable to the method of drilling shells by the use of this machine at the du Pont Engineering plant at Penniman, Virginia.

PICATINNY ARSENAL, DOVER, N. J.

38. During the period between April of 1921 and August 1931, a vertical drilling machine for shell loading operation was in use at the Picatinny Arsenal. This machine is shown in plaintiff's Exhibits 11–B and 11–D, which are Government drawings furnished in response to a call, and a third drawing, plaintff's Exhibit 13, which shows the details of the shell holder used at this period at Picatinny Arsenal. These exhibits are made a part of this finding by reference.

The drilling machine was of the inverted type and comprised a pair of vertical columns with a shell holder mounted adjacent the top of the columns, the drill mechanism being mounted at the lower end. As disclosed more particularly in plaintiff's Exhibit 13, the shell holder consisted of a

fixture bolted to the columns, the fixture carrying a supporting member having a tubular opening in alinement with the axis of the drill. A snugly fitting sleeve was inserted in the supporting member and this sleeve in turn fitted snugly around the shell, which was inserted from the top and was positioned therein by its rotating band resting on the top of the sleeve, so that the shell hung in the fixture nose downward and was supported at its *upper* end by the rotating band which rested in a recess on the top of the sleeve.

The drill was of the double-diametered type and its depth of penetration into the explosive mixture was determined by the contact of a collar with the mouth or nose of the shell. This collar was carried on the drill shaft.

The borings from the drill fell by gravity into a hopper and thence down a chute to the floor or a box. A portable hose and nozzle similar to a vacuum cleaner was manually used by the operator to remove borings and dust from the floor and various members of the machine from time to time, and there was no construction or device to enclose that portion of the drilling machine adjacent the drill and to apply continuous suction thereto.

As disclosed, this machine had no stop of any kind to engage the shell at its forward end for positioning the shell and had no indicating means for determining the longitudinal position of the shell.

The phraseologies of claim 6 of the apparatus patent and claims 4 and 8 of the method patent are applicable to this drilling machine.

PRIOR ART

39. The following patents were available to those skilled in the art on the respective dates indicated, all of which dates are more than two years prior to November 20, 1916, the application date of the first Thompson application to be filed:

U. S. Patent to Goell, No. 2,009, issued March 18, 1841 (defendant's Exhibit 1);

U. S. Patent to Revenaugh, No. 267,590, issued November 14, 1882 (defendant's Exhibit 4);

British Patent to Abel, No. 3,743, printed in 1881 (defendant's Exhibit 5);

U. S. Patent to Ensign, No. 726,662, issued April 28, 1903 (defendant's Exhibit 18);

U. S. Patent to Trahern, No. 178,350, issued June 6, 1876 (defendant's Exhibit 13);

U. S. Patent to Whiton, No. 571,817, issued November 24, 1896 (defendant's Exhibit 14);

U. S. Patent to Pember, No. 962,583, issued June 28, 1910 (defendant's Exhibit 26);

U. S. Patent to Tunks, No. 994,430, issued June 6, 1911 (defendant's Exhibit 8);

U. S. Patent to Mefford, No. 413,606, issued October 22, 1889 (defendant's Exhibit 9);

U. S. Patent to Render, No. 622,711, issued April 11, 1899 (defendant's Exhibit 6);

French Patent to Elwell, No. 436,378, published March 26, 1912 (defendant's Exhibit 40).

40. The following patents were issued on applications filed in the United States Patent Office prior to August 27, 1915, the earliest conception date established by plaintiff Thompson:

Thompson patent No. 1,200,046, application filed August 2, 1915, patented October 3, 1916 (defendant's Exhibit 64);

Thompson patent No. 1,200,047, application filed August 10, 1915, issued October 3, 1916 (defendant's Exhibit 65);

U. S. Patent to Holden, et al., No. 1,215,804, application filed May 29, 1915, issued February 13, 1917 (defendant's Exhibit 63).

The above-enumerated exhibits are made a part of this finding by reference.

41. The U. S. Patent to Goell, issued March 18, 1841 (defendant's Exhibit 1) discloses what is referred to as "machines for boring war-rockets." The specification describes the machine as one for boring the conical opening into the composition which forms the charge of war-rockets, the rocket or projectile being described as a casing filled with a charge and having a conical opening bored through the center hole in the base which may extend two-thirds or three-quarters of the whole length of the rocket.

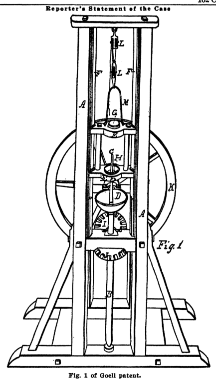


Fig. 1 of Goell patent.

The specification, after referring to prior practice in boring the conical openings by means of a drill or borer running horizontally and referring to such method as "a process by which the composition has not been freely delivered from the opening, and in the performance of which other difficulties have been encountered", describes a vertical

boring machine, Fig. 1 of the patent being reproduced herewith. As shown in the accompanying drawing, the drilling device comprises a vertical rotatable shaft carrying a suitably dimensioned drill at its upper end for boring the conical hole in the rocket composition. The shaft and the drill at its upper end are rotatable by means of a suitable hand wheel and bevel gearing.

The two frame members of the machine are extended upwardly and the major part of their interior surfaces forms a pair of vertical guides indicated in the drawing as F F. A work holder or carrier frame is adapted for vertical movement up and down the guides. The work holder consists of upper and lower cross members, the upper cross member having a circular opening therein which conforms to the outer contour of the rocket or projectile case. The lower cross member of the carrier is provided with a cup H into which the lower end of the rocket is inserted, where it rests on a shoulder and is clamped in place by a thumbscrew.

In operation, the rocket casing is mounted in place in the sliding carrier, its bottom end engaging the shoulder or stop at the lower or forward end of the work holder, the openings in the work holder as shown in the drawing being in axial alinement with each other and also in axial alinement with the drill, so that the rocket or projectile is longitudinally positioned with respect to the relative path of reciprocation of the work holder with respect to the boring tool.

As the work holder is lowered onto the drill the borings fall by gravity into the cylindrical cup D mounted on the drill shaft immediately below the drill.

Fig. 1 of the drawing indicates that the flat surfaces formin the guides F F end at a point adjacent the peripheral edge of the cup, the termination of the guides F F at this point obviously being for the purpose of limiting the downward movement of the work holder to a point where it will not contact or damage the cup.

42. U. S. Patent to Revenaugh issued November 14, 1882 (defendant's Exhibit 4) shows a double-diametered drill or cutter adapted to simultaneously drill a double-diametered hole.

Fig. 3 of the patent drawings is reproduced herewith and shows a drill member B for drilling a hole, this drill member being provided with a cutter of a greater diameter than the drill B, the cutter and the drill being relatively adjustable with respect to each other so as to regulate the depth of each portion of the double-diametered hole. The outer cutter

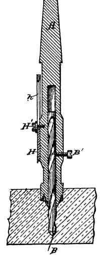


Fig. 3 of Revenaugh patent.

also carries an adjustable stop member H, the function of which is to regulate the entire depth of the hole to be drilled. The end of the adjustable stop member comes into contact with the work and thereby prevents further penetration of the double-diametered drill.

43. British Patent to Abel, printed in 1881 (defendant's Exhibit 5) relates to machinery for boring and countersinking the hole in the metal portion of a shell. The particular

type of shell described in connection with this patent is one in which the bursting charge is introduced in the form of a cartridge or case.

The machine, which operates simultaneously on two shells, comprises a horizontal bedplate, in the center of which is a headstock carrying a pair of oppositely disposed horizontal drill spindles. To each of the drill spindles is attached a cutter for boring the hole in the shell. In addition, each spindle carries a second cutter for countersinking the outer end of the hole, the drilling operation thereby simultaneously producing a double-diametered opening. The shells are carried in a work holder at each end of the bedplate, the work holder being capable of reciprocatory motion along fixed guides to and from the drills.

44. U. S. Patent to Ensign, issued April 28, 1903 (defendant's Exhibit 18) discloses a boring and reaming machine of the horizontal type and in which the work holder or carrier is reciprocated to and from a horizontal drill. The work holder consists of a pair of self-centering, V-shaped jaws mounted on a fitting so as to be movable to and from each other on suitable guide ways. The movement of the two jaws is accomplished by a screw rod having right-and-left hand threads.

In order to bring the work in the work holder to a proper longitudinal position with reference to the operation to be performed thereon by the drill, one of the work holder jaws is provided with a rod upon which a stop is adjustably mounted. When the work is placed in the work holder the operator before tightening the same moves the work forward until its front end abuts against the stop which has previously been adjusted on the rod. When the V-jaws of the work holder are then clamped on the work it is centered in the jaws and in proper longitudinal position for the subsequent drill operation.

In the form of adjustable stop herein disclosed the stop member is slidable on its supporting rod or arm, and may be fixed thereto in any suitable position by means of a set screw. The machine is also provided with another stop member which controls the distance to which the carriage and the reciprocating work holder may be advanced toward

the drill. This stop member comprises two stop rods which are longitudinally adjustable in a bracket secured to the bed of the machine at a point adjacent the drill mounting. As shown in Fig. 1 of the drawing, these stop members indicated by P are threaded and are adjustable relative to the bracket by means of nuts operating on the screw thread.

45. U. S. Patent to Trahern, issued June 6, 1876 (defendant's Exhibit 13) discloses a machine of the vertical type for boring metal cylinders. The drill rotating mechanism is located at the top of the machine and functions to rotate a vertically mounted shaft upon which a cutting tool is mounted. The work holder or carrier is at the lower end of the machine and is adapted for vertical reciprocation with respect to the cutter. The work holder is provided at its upper and lower extremities with self-centering chucks, each one of which has conical openings alined centrally with the axis of the boring bar or cutter holder. The upper chuck is hinged to provide a swinging movement, and the lower chuck is provided with a right angle piece which is vertically adjustable with respect to the remainder of the carriage in order to enable the machine to receive cylinders of various lengths.

An alternate form of chuck is disclosed in which a plurality of screw-threaded members is adapted to laterally position and adjust the stop with respect to the axis of the cutting tool. Fig. 5 of this patent, which is reproduced herewith, shows this method of adjustment in which three screw-covered members located at 120° to each other project through the work holder and may be used to properly center the work.



Fig. 5 of Trahern patent.

46. U. S. Patent to Whiton, issued November 24, 1896 (defendant's Exhibit 14) discloses a metal boring machine of the horizontal type in which the bedplate supports a drill spindle, and a work holder which is capable of moving on guides along the bedplate to and from the drill spindle.

Two gauges are disclosed for regulating and controlling the depth of penetration of the drill in the stock. The first of these gauges is for indicating the longitudinal position of the stock with reference to the drill and consists of an indi-

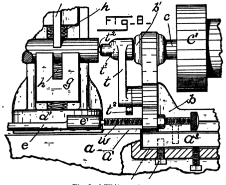


Fig. 8 of Whiton patent.

cating spacing member pivotally mounted on a lever so that when thrown in an upward position one end of the gauge engages the forward end of the stock, thereby indicating the longitudinal position of the stock with respect to the path of reciprocation of the boring tool. This pivotally mounted gauge is indicated by the reference characters t and t^2 in Fig. 8 of the Whiton patent reproduced herewith.

A stop is indicated by reference character w. As shown, this is screw-threaded and is adjustable so that the extent of travel of the carriage with respect to the drill may be predetermined by the work holder or carriage contacting the stop.

47. U. S. Patent to Pember, issued June 28, 1910 (defendant's Exhibit 26) discloses a work gauge adapted for attachment to machinists' calipers. It it similar to the gauge shown in the patents in suit in that it comprises an indicating arm which is pivotally mounted near one end thereof so as to magnify the motion of the gauge.

48. U. S. Patent to Mefford, issued October 22, 1889 (defendant's Exhibit 9); U. S. Patent to Tunks, issued June 6, 1911 (defendant's Exhibit 8), and U. S. Patent to Render, issued April 11, 1899 (defendant's Exhibit 6) all disclose machines in which waste products are removed by suction.

The Mefford patent discloses a lathe in which the dust and chips formed by the operation of the cutting tools on the work are drawn into a hood and through a connecting pipe and deposited in any desired place.

The Tunks patent shows the same basic idea, in which a suction flue is provided for drawing off the cuttings and dust from a drilling operation.

The Render patent shows a suction pipe or device used in connection with apparatus for filling explosive cartridges. The specification states that the purpose of this suction device is "to preserve the attendant from ill effects when working compounds containing deleterious substances, such as dinitrobenzol, the machine being so arranged as to prevent any fumes that may arise from the material or dust or particles thereof coming into contact with the operator while working."

49. French Patent to Elwell, published March 26, 1912 (defendant's Exhibit 40) shows a machine for tapping the bases of shells. The machine shows a rotatable work holder which holds the shell to be tapped, this being movable longitudinally with respect to the rotating cutter. The shell holder comprises a chuck, at one end of which is a screw-threaded centering device for receiving the nose of the shell, this centering device being capable of axial adjustment by means of its screw threads. The opposite or base end of the shell is locked in place by means of a threaded rotatable ring having a tapered internal bore and screwed in place by a spanner.

50. The two Thompson patents issued October 3, 1916 (defendant's exhibits 64 and 65) both relate to machines in

which a shell is mounted in a work holder for longitudinal reciprocation with respect to a rotating cutting tool.

Patent 1,200,046 (defendant's exhibit 64) discloses a shell holder in which the shell is inserted at its forward end and is positioned by a threaded stop projecting from the rear end of the work holder. Turning of the threaded stop effects a longitudinal adjustment of the shell relative to the holder. After the shell has been placed against the stop it is locked in position by means of an annular tapered clamping sleeve which is tightened by a handwheel at the rear of the shell holder.

Patent 1,200,047 (defendant's exhibit 65) discloses various modifications of the shell work holder. In Fig. 4, a central rod is supported by a spider and is capable of threaded longitudinal adjustment in the center of the shell holder. When the shell is inserted in the holder a conical annular clamping ring secures the shell by moving inwardly and at the same time tends to tighten the shell against the adjustable stop. The annular clamping ring is actuated by a screw-threaded handwheel.

In both disclosures the adjustable stop is carried by the shell holder or supporting means.

PRIOR USE

51. A machine for drilling the booster cavity in the explosive material of shells was in use by the Government at its Frankford Arsenal from September 1913 to February 1915. This machine was designed by one Frederick C. Gladeck, employed as a draftsman at Frankford Arsenal.

The first drawings of the machine were completed on July 7, 1911. Certain minor revisions to these were made, and the machine as finally constructed was made in accordance with a set of working drawings bearing the revision date of April 25, 1913, copies of the revised drawings, defendant's Exhibits 48–A to 48–D, inclusive, being made a part of this finding by reference.

The machine as actually constructed, and as illustrated in the above-mentioned drawings, comprised a horizontal shell supporting table, mounted for rotation. The table carried

six shell supports spaced equiangularly at 60 degrees with respect to each other. The table was mounted so as to be rotatable about a central pivot and was provided with an indexing mechanism whereby the table could be rotated through the exact angular spacing of the shell holders and then locked in position.

Each shell support was so constructed as to form a guide adapted to receive a shell and laterally position it so as to be in alinement with the path of movement of a drill. The drill was designed to bore out the explosive and to form a hole of sufficient depth to receive the detonator. The drill was provided with a stop which would limit the operation of the drill to the predetermined depth. When the table was indexed or rotated through 60 degrees the shell which had been drilled was brought into proper alinement with a reaming tool, the outer contour of which was similar to that in the exterior of the booster. The reamer was also provided with a stop for predetermining the depth of its penetration in the explosive charge, and both the drill and the reamer were driven by common gearing, which was in turn operated by hand power.

The shell holders or supports which were mounted on the table were provided with a series of interchangeable V-blocks or rests for the shell so that the drilling machine could be set up to operate on various sized shells. The shell holders were also provided at their outer ends with an upstanding stop member, the stop member properly positioning the shell in the holder so that the shell was longitudinally positioned with respect to the path of reciprocation of the boring tool. A receptacle for receiving the borings of the explosive charge was positioned just below and forwardly of this stop.

In the operation of the Gladeck drilling machine, shells would be placed in four of the shell holders, their base end being properly positioned against the stop and the shell locked in place by a locking mechanism. The table would then be indexed through 60 degrees and locked in place with the first shell in position for the drilling operation. When this had been completed, the table would be again indexed 60 degrees, bringing a new shell in front of the drill and

moving the shell previously drilled into the proper position before the reamer. From then on one shell would be simultaneously reamed as the second shell was being drilled.

52. While the machine described in the previous finding was still in operation on November 14, 1914, an order went through for the construction of an additional machine. This second machine was constructed in accordance with working drawings, defendant's Exhibits 53-A to 53-D inclusive, which are made a part of this finding by reference, and was similar in operation and function to the drilling machine described in the previous finding, with the exception that in the second machine the drill and reaming tools were power-driven instead of hand-driven, and visual gauges were provided on the drill and reamer tools in addition to the stops.

This new machine was placed in operation some time in 1915 and both machines were used for drilling shells in quantity production until the loading of projectiles was discontinued at Frankford Arsenal after the Armistice, on November 11, 1918.

53. The Gladeck drilling machines at Frankford Arsenal were not secret devices and there is no evidence that any of the employees familiar with the machines or having knowledge of them were placed under any secrecy orders. An average of one or two visitors a week was shown through the loading plant where the drilling machines were in operation. Some of the visitors were military men, and some were business men; visitors who were admitted to the plant were principally people desirous of finding out methods of manufacturing munitions.[1]

54. Prior to August 27, 1915, the earliest date of conception of any of the alleged inventions in suit, it was known to those skilled in the art that a cavity could be formed in the explosive material contained in a projectile by supporting the projectile vertically above the drill so that the borings would tend to drop away from the projectile under the action of gravity when the drill and the projectile were relatively moved along a vertical path with respect to each other.

[1] See *McElrath* v. *Industrial Rayon Corp.*, 35 F. Supp. 198.

It was further known that, in practicing such an operation, projectiles could be mounted in a carrier or guide having openings in alinement with the path of the drill or boring tool, the guide or projectile carrier also having means for supporting the projectile at its bottom end and positioning it both laterally and longitudinally of the axis of the drill or boring tool. (See finding 41.)

It was known to those skilled in the art prior to August 27, 1915, that a double-diametered hole could be bored at one operation by the use of a drill shaft having mounted thereon cutters of two different diameters.

It was also old in the art to control the depth of penetration of a double-diametered drill into a piece of work by a stop member mounted on the drill shaft adapted to engage the face of the piece of work when the drills had penetrated the work to the desired extent. (See finding 42.)

The use of two-diametered drills was not only known in the general mechanical arts but this was also true of the art more specifically relating to shell drilling. (See finding 43.)

55. Prior to the date of conception of the Thompson patents it was old and well known in the art to utilize a work holder in which the work or stock is capable of being both laterally and longitudinally adjusted with respect to the drill or tool, and the use of gauges and adjustable stops for properly positioning the work was also known to those skilled in the art. (See findings 44, 45.)

Prior to August 27, 1915, the use of exhaust or suction devices for removing chips and debris from drilling operations was well known to those skilled in the art. (See finding 48.)

56. Claims 1, 4, 8, and 10 of the plaintiff's method patent are in issue and are applicable to the alleged infringing devices as set forth in finding 34. Claims 4 and 8 are applicable to the devices set forth in findings 37 and 38. The method defined in claim 1 of the method patent differs from the disclosure of the U. S. Patent to Goell (finding 41) only in that it includes as a step in the method the removal of the borings of the explosive by suction. To apply such a method of removal to the structure disclosed in the Goell patent would be a mere mechanical expedient in view of the

prior art and would be within the knowledge of those skilled in the art.

This claim is not directed to novel subject matter and is invalid.

57. Claim 4 of the method patent is not limited to a vertical drilling process but relates merely to relatively moving a shell and a drill and limiting the penetration of the drill by the end of the shell at its mouth. This is the same method that was used in connection with the Gladeck drilling machine. (See finding 51.)

This same method is also disclosed in the U. S. Patent to Goell, in which the shoulder in the lower guide engages the end of the tubular projectile casing at its mouth, the downward motion of the carrier being limited by the extent of the flat surface of the vertical guides in the Goell machine.

This claim is invalid.

58. Claim 8 of the method patent is directed to a vertical drilling method in which the explosive is drilled out from the interior of a projectile having bores of different diameters and in which such drilling is performed by a double-diametered drill, the penetration of which is gauged or controlled with reference to the end of the projectile. The projectile shown in the Goell patent is one which has bores of two diameters, viz, the interior of the rocket casing comprising the larger diameter and the central opening in the bottom or end of the projectile comprising a bore of smaller diameter. To use the double-diametered drill of Revenaugh in the drilling machine disclosed in the Goell patent would be within the knowledge of those skilled in the art and would therefore be merely a mechanical expedient. Such use might contemplate either the gauging of the depth of penetration by the stop member associated with the double-diametered drill of Revenaugh or the limitation of downward movement of the projectile carrier of Goell on the flat guide surfaces. The selection of either of these two alternative depth-limiting devices, both of which are old in the art, would involve mere mechanical expediency.

This claim is invalid.

59. The method outlined in claim 10 of the method patent differs from claim 8 only in reciting, as an additional step,

the use of suction to remove the drill borings. Such additional step, which is old in the art, would not contribute any new or unexpected result to the use of the Revenaugh drill in the Goell machine, and its use would be within the knowledge of those skilled in the art.

This claim is invalid.

60. The claims in issue of the Thompson method patent, 1, 4, 8, and 10, are invalid.

The Thompson method patent in suit is also void in its entirety because of plaintiff's failure to file a disclaimer as to the subject matter of claims 2, 3, 5, 6, 7, and 9 concerning which priority was awarded to Howard A. Stillwell by the then Court of Appeals of the District of Columbia on May 7, 1923. See findings 25 and 26.

61. The claims in issue of the Thompson apparatus patent are claims 1, 3, 4, 5, 6, 7, 11, and 14. Of these, only claims 6 and 7 are applicable to drilling machines used for the Government in loading high-explosive shells subsequent to July 1, 1918, at the Atlantic Loading Company and Evans Engineering Company and only claim 6 is applicable at the Picatinny Arsenal. See findings 34 and 38. The remainder of the claims in issue are found not to apply to any of the alleged infringing devices.

62. Claims 6 and 7 of the Thompson apparatus patent are the more basic claims of this patent and for convenience they are again quoted, as follows:

> 6. Boring apparatus comprising a boring tool, means for reciprocating the boring tool along a fixed path, a guide having an opening in alinement with said path for laterally positioning the stock and means for at least partially supporting the stock and for positioning the stock longitudinally of said path.
>
> 7. Boring apparatus comprising a boring tool, means for reciprocating the boring tool along a fixed path, a guide having an opening in alinement with said path for laterally positioning the stock and means disposed forwardly of the guide in engagement with the forward end of the stock for at least partially supporting the stock and for positioning the stock longitudinally of said path.

These claims are invalid in view of the Goell machine, finding 41, which, although it has a different arrangement of fixed

and moving parts, performs the same function in substantially the same way.

63. Claims 6 and 7 are not limited to an inverted boring structure or to the use of a double-diametered drill. The phraseology of both of these claims is applicable to the Gladeck drilling machine (finding 51) in which the drill was reciprocated on a fixed path and in which the shell was positioned with respect to the path of the boring tool by means of a guide or projectile holder which held the shell in proper alinement with the path of movement of the drill and supported the shell in proper position longitudinally of the path of the drill.

In the Gladeck drilling machine the shell holders were provided at their outer ends with an upstanding stop member which engaged the forward end of the shell and formed a cooperating means with the shell holder whereby it was held both laterally and longitudinally in proper relationship to the fixed path of movement of the drill.

Claims 6 and 7 are also invalid in view of the Gladeck drilling machine.

64. Claim 1 of the apparatus patent differs from claims 6 and 7 in that it specifies that the stop member for engaging the forward end of the stock or shell is threaded on the forward end of the supporting member so that it may be adjusted longitudinally of the path of reciprocation of the boring tool.

The phraseology of this claim is readable upon the French patent to Elwell (see finding 49) which discloses a shell boring machine in which the shell is reciprocated with respect to the cutting tool, and the shell is carried in a supporting member which has an adjustable threaded stop carried on the forward end of the shell member so that the shell can be adjusted longitudinally of the path of reciprocation.

The rear end of the shell carrier or supporting member is also provided with an adjustable threaded annular ring or second stop member, which cooperates with the threaded stop member at the opposite end of the shell holder to lock the shell tightly in proper longitudinal position.

Claim 1 of the apparatus patent is invalid, in view of the disclosure of the Elwell patent. This claim is also invalid as

anticipated by the disclosure of the shell drilling machines of the prior art A. M. Thompson patents. Finding 50.

65. All of the claims in issue of either plaintiff's apparatus patent or his method patent, which are applicable to an unauthorized or unlicensed use of a shell drilling machine used for or by the Government subsequent to July 1, 1918, are invalid.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinon of the court:

The plaintiff sues the Government, under a special Act of Congress which is quoted in finding 1, for use of his two patents, one of which was a patent on apparatus, the other a patent on method. The special act had the effect of giving the plantiff the right to sue under the Act of July 1, 1918, 40 Stat. 704, 705, notwithstanding the lapse of time or the statute of limitations, which, but for the special act, would have barred the suit. The 1918 act provides:

> * * * That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: * * *.

The plaintiff claims that the Government at its Picatinny Arsenal, used his patented apparatus and method in loading shells, and that four different contractors who loaded shells for the Government under contracts, also used the plaintiff's patented apparatus and method. The Government asserts several defenses, including the invalidity of the patents for lack of invention, which defense we will first consider.

The uses made by the Government or its contractors were, as we have said, in connection with the loading of shells. The devices claimed to be infringements were used to drill holes in T. N. T. or similar high explosive fillings of shells, which had been poured into the shell casings in a molten

state, and had there hardened. It was necessary to drill a hole in the explosive in each shell, to make a place for the insertion of the booster or detonator. The hole for the detonator was of a smaller diameter than that of the threaded opening in the shell casing, into which opening the detonator casing would be screwed. It was economical, therefore, to use for the drilling a bit or drill having two diameters, a small one and, farther back on the bit, a larger one, big enough to make the larger recess necessary for the threaded portion of the detonator casing. It was necessary that the shell casing with the hardened explosive in it, be held firmly in place while being drilled; that the drill be in alinement with the center of the shell, and that the drill be stopped when it had penetrated to the desired depth, i. e., when the small and large diameters of the hole were deep enough to receive the detonator and its enlarged threaded portion. For efficient fragmentation of the shell when it was detonated, and to prevent premature explosions, it was necessary that the holes be accurately drilled to the sizes of the parts to be inserted in them.

The plaintiff's apparatus patent No. 1,238,362, described in findings 14, 15, and 16, makes no mention in its claims that it is for drilling holes in explosives. It speaks merely of "stock" as the subject to be drilled. The broadest claim, of those asserted in this suit, is claim No. 6. It reads as follows:

> Boring apparatus comprising a boring tool, means for reciprocating the boring tool along a fixed path, a guide having an opening in alinement with said path for laterally positioning the stock and means for at least partially supporting the stock and for positioning the stock longitudinally of said path.

This claim, and claim 7, which is almost identical, were anticipated by the patent to Goell, discussed in finding 41 issued as far back as 1841 and which was, significantly, a machine for boring a hole in the explosive composition contained in "war-rockets." In the Goell machine the stock moved to the drill, instead of the drill moving to the stock, as in the plaintiff's machine. That difference is of no importance, *Duner Co.* v. *Grand Rapids R. Co.*, 171 Fed. 863, and other authorities there cited, as the plaintiff itself recognized when it was

obtaining its patent. See defendant's Exhibit 43, pages 13, 22. The plaintiff urges that the Goell machine had no stop to halt the downward progress of the rocket holder when the drill had penetrated to the desired depth. The drawing shown in the figure reproduced in finding 41 seems to us to show a termination of the flat surfaces which serve as guides for the work holder, stopping its downward progress. We think it is not strange that no number or legend should have been appended to a device so simple and so obviously necessary.

The plaintiff's claims 6 and 7 of its apparatus patent were also anticipated by the Gladeck drilling machine, built and used in the Government arsenal at Frankford, and discussed in finding 51.

The plaintiff's claim 1 of its apparatus patent includes, in addition to the elements of claims 6 and 7, the requirement that "the stop * [be] threaded on the forward end of the supporting member so that it may be adjusted longitudinally of the path of reciprocation of the boring tool." This provision for the positioning of the stock to the desired location by the turning of a threaded stop had been anticipated in 1912 by the French patent to Elwell, discussed in finding 49. A not essentially different device for the positioning of the stock is shown in United States patents to A. M. Thompson, discussed in finding 50.

As to the plaintiff's claims based on his method patent, No. 1,255,836, our findings 56–60 express our conclusion that the claims of that patent here in issue, i. e., claims Nos. 1, 4, 8, and 10, are invalid because they were anticipated or because they lack invention. We will not repeat those conclusions here.

The Government claims that the plaintiff's method patent is void in its entirety because of the plaintiff's failure to file disclaimers of several claims of that patent. The relevant facts are given in findings 25 and 26. The then Court of Appeals of the District of Columbia found, in effect, that as to several of its claims, the plaintiff's method patent had been improvidently granted, one Stillwell having been the prior inventor of the subject matter of those claims. The court's

decision was in 1923. The Patent Office issued a patent to Stillwell in 1925.

The applicable statutes [2] permit a patentee in certain situations to save the good portion of his patent by a disclaimer of those parts of his patent as to which he was not the prior inventor. And the latter of the two cited sections expressly provides that the patentee may not maintain a suit on his patent "if he has unreasonably neglected or delayed to enter a disclaimer." In the instant case some twenty years have elapsed since the court's decision pursuant to which a patent was issued to Stillwell covering several of the claims of the plaintiff's method patent, and the plaintiff has filed no disclaimer, nor has he or any assignee of his brought suit under the provisions of 35 U. S. C. 66. See finding 26. For this reason, the plaintiff's method patent is invalid as to all of its claims. *Marconi Wireless Co.* v. *United States*, 320 U. S. 1, 57.

In view of what we have said, it is not necessary to determine whether the facts disclosed by the plaintiff's evidence should cause us to conclude that the International Steel and Ordnance Corporation had an implied license to use the plaintiff's patents. See finding 31.

We conclude, therefore, that the claims of the plaintiff's apparatus patent which were applicable to any of the machines used by or for the Government were invalid for lack of invention; that the claims of the plaintiff's method patent which were applicable to any of the methods used by or for the Government were invalid for the same reason, and also for failure of the plaintiff to file a disclaimer within a reasonable time.

The petition is dismissed. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge;* and WHITAKER, *Judge*, took no part in the decision of this case.

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[2] Act of July 8, 1870, ch. 230, §§ 54, 60, 16 Stat. 206, 207, 35 U. S. C. 65, 71.

W. J. PHILLIPS v. THE UNITED STATES

[No. 44286. Decided December 4, 1944]

On the Proofs

Increased costs under the Act of June 25, 1938; claim timely filed.—Where it is established by the evidence that the increased cost of material used by a subcontractor on a Government building was due to the enactment of the National Industrial Recovery Administration Act, it is *held* that plaintiff, whose claim therefor was timely filed, is entitled to recover under the provisions of the Act of June 25, 1938 (52 Stat. 1197). *Consumers Paper Company* v. *United States*, 94 C. Cls. 713; affirmed 317 U. S. 595.

Same; failure to present proof of increased labor costs.—Where there is a total lack of proof on the part of the plaintiff to establish what the labor costs were before and after the enactment of the National Industrial Recovery Administration Act, there can be no recovery under the provisions of the Act of June 25, 1938 (52 Stat. 1197).

Same; burden of proof on plaintiff.—The burden of proof is always on the plaintiff to establish his case by the preponderance of the evidence under the 1938 Act.

Same; claim not timely filed.—There can be no recovery under the provisions of the Act of June 25, 1938 (52 Stat. 1197) where the claim was not presented prior to June 15, 1935, as required by the statute.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for the plaintiff. *Rhodes, Klepinger* and *Rhodes* were on the brief.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Currell Vance* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a citizen of the United States and a resident of the City of Detroit, State of Michigan.

2. This claim is brought pursuant to the Act of Congress approved June 25, 1938, entitled Public No. 741—75th Congress, Chapter 699, 3d Session, S. 3628, an "Act to confer jurisdiction on the Court of Claims to hear, determine and enter judgment upon claims of Government contractors

whose costs of performance were increased as a result of enactment of the National Industrial Recovery Act on June 16, 1933."

3. On the 28th day of January 1933, plaintiff entered into a contract with A. W. Kutsche and Company, general contractor, which had on November 7, 1932, entered into a contract numbered T1SA3671 with the United States for the construction of a post office building at Springfield, Ohio. By the terms of his contract with the general contractor, plaintiff was required to furnish all labor and materials necessary to complete heating, plumbing and ventilating work in the construction of the post office building.

4. On February 17, 1933, plaintiff entered into a contract with A. W. Kutsche and Company, general contractor, which had on December 10, 1932, entered into a contract numbered T1SA3796 with the United States for the construction of a post office building at New Castle, Pennsylvania. By the terms of the contract with the general contractor, plaintiff was required to furnish all labor and materials necessary to complete heating, plumbing and ventilating work in the construction of the post office building.

5. Plaintiff was at all times material to this case trading and doing the business of a plumbing, heating and ventilating contractor, as a sole ownership in the plaintiff, under the name and style of W. J. Phillips Company.

6. The contract prices for which provision was made in the plaintiff's contracts with said general contractor, referred to in findings 3 and 4, were based upon costs of labor and materials existing on or about the dates of said contracts referred to above.

7. Both of the subcontracts referred to above were fully performed by plaintiff, and plaintiff was paid the contract prices provided therein.

8. The amounts claimed by plaintiff in this action, as set out in his audit report, are as follows:

Springfield, Ohio, Post Office	
Materials	$424.66
Labor	2,173.80
Overhead	4,972.32
Profit—10% on original estimated cost of $27,619.11	2,761.91
Total Claim	10,332.69

Reporter's Statement of the Case

New Castle, Pennsylvania, Post Office

Materials	$100.95
Labor	1,480.00
Overhead	2,325.88
Profit—10% on original estimated cost of $15,389.24	1,538.92
Total Claim	5,445.75

being a total claim for both contracts of $15,778.44.

Plaintiff's figures are subject to certain deductions for errors. From the amount of $2,173.80 on the Springfield, Ohio, project should be deducted the sum of $137.00, leaving $2,036.80. From the amount of $1,480.00 on the New Castle, Pennsylvania job should be deducted $6.40, leaving $1,473.60.

Plaintiff's claim would thus be reduced by the amount of such errors, leaving the amount claimed as $15,635.04.

9. Work on the Springfield, Ohio post office was begun April 3, 1933, and on the New Castle, Pennsylvania, post office April 1, 1933. Plaintiff contemplated finishing his work as subcontractor on the Springfield contract January 10, 1934, whereas it was actually completed October 25, 1934. He contemplated finishing the New Castle subcontract October 31, 1934, whereas it was actually completed December 15, 1934. The 200 and 150 days' contemplated performance-period on the Springfield, Ohio, and New Castle, Pennsylvania, post offices, respectively, referred to work days on a five-day week basis, and were adequate with normal working conditions and no unusual delays.

10. In the construction of a building, after the necessary excavation work is performed, the contractor for plumbing, heating and ventilating carries his work along with the erection of the structure as required. After basement walls are built, the plumbing pipes are installed. When the superstructure walls and roof are placed, the appropriate pipes are there installed and are carried to their proper locations through the building along with the roof drains. At the time of construction of the walls for the superstructure, the heating pipes are installed, being carried to their respective locations and concealed within the walls. The ventilating system is usually installed later. From the point of the installation of the plumbing and heating and the superstructure in the basement, the contractor arrives at a point

in his work where he has put in his stubs leading into the final fixtures, and has an interruption or interval where he waits for the installation of the plaster walls and ceilings, installation of floors in certain instances and installation of finished work, and then he returns to the final erection of his own finished work.

The work of the plumbing and heating contractor depends largely upon the progress made in erecting the building. A delay in the building operation will result in delay of installation of heating and plumbing. The heating and plumbing and ventilating work cannot well be anticipated throughout the building.

Plaintiff's work of plumbing, heating and ventilating under the instant contracts, was performed in substantial accordance with the foregoing plan.

11. In connection with the Springfield, Ohio, contract, plaintiff was subjected to considerable delay, but indefinite in point of time, on account of a number of necessary extensions of time granted by the defendant to Kutsche and Company, the prime contractor, for the building. These extensions of time for completion amounted to 242 days.

Plaintiff was likewise subjected to delay because of failure of one of plaintiff's subcontractors to carry out its contract. There is no proof as to the extent of this delay, or as to the amount of loss suffered.

These delays were not caused by and had no connection with the National Industrial Recovery Act.

Plaintiff suffered further delays in his work having no relation to the National Industrial Recovery Act, including improper storage of material by plaintiff on the roof slab and also by sabotage in the sewer pipe under the basement. There is no proof as to the extent of the delay.

12. In connection with the New Castle, Pennsylvania, contract, Kutsche and Company, the prime contractor, was granted extensions of time on account of delays not caused by and in no way connected with the National Industrial Recovery Act. These extensions amount to 329 days, which affected plaintiff's time for completion of his subcontract. Plaintiff was, therefore, subjected to material delay in carry-

ing out his contract; however, the proof does not show the extent of the delay.

13. There was some delay in carrying on plaintiff's work common to both contracts, namely, many of the workmen appeared to slow down and not produce a full day's work, believing that they would receive the same or greater wages for fewer hours of work under the National Industrial Recovery Act. However, plaintiff upon making inquiry, was informed that the National Industrial Recovery Act did not apply to these particular contracts, but but that the work would be carried on under the contracts as written. As to this delay there is no proof showing the amount of costs incurred or the extent of the delay.

14. Plaintiff complied with the President's reemployment agreement and with the appropriate code for his trade.

15. It was not necessary for plaintiff to make any changes in the hourly wages paid or in the hours worked by his employees, by reason of the enactment of the National Industrial Recovery Act, inasmuch as the hours and wage scale in use by plaintiff was sufficiently liberal to comply with the requirements of the National Industrial Recovery Act, and no such changes were made by plaintiff.

16. After the enactment of the National Industrial Recovery Act, plaintiff expended in the performance of the above contracts, in the purchase of materials, an increased amount over that for which these materials could have been purchased prior to its enactment, as follows:

Supplies for post office at Springfield, Ohio	$218.52
Supplies for post office at New Castle, Pennsylvania	100.95
Total	$319.47

This increase, $319.47, was an increase in cost which was incurred as a result of enactment of the National Industrial Recovery Act.

17. Plaintiff bases his claim for increased labor costs upon delay caused by other subcontractors performing work on said contracts, due to their compliance with the National Industrial Recovery Act, which in turn delayed plaintiff. Plaintiff arrived at the amount of this increase by taking the difference between his actual payroll on each job and his

estimate, prior to entering into the two subcontracts, of what the payroll should be on the two respective subcontracts.

There is no competent proof that other subcontractors on these two projects complied with the National Industrial Recovery Act.

Plaintiff was subjected to very material delays by reason of the extensions of time granted the prime contractor; additional work in connection with his own contract, as well as the contributing factor of two other subcontractors' failing on their contracts, and also certain delays arising from his own acts, as set forth in findings 11, 12, and 13, as well as a slowing up of the workmen. The proof does not show a definite amount of delay attributable to any of the causes. There is no basis for determining any definite amount of excess labor costs incurred by plaintiff under the proof submitted in the case.

18. Plaintiff's actual cost of overhead exceeded that which he estimated for the purpose of bidding. This excess plaintiff claims herein, and it is based on delays which are not satisfactorily proved to have been the result of enactment of the National Industrial Recovery Act. The excess cost of overhead, so claimed, was not incurred as a result of enactment of the National Industrial Recovery Act.

19. Plaintiff filed claim for increased cost of performance on the Springfield, Ohio, subcontract under the provisions of the Act of June 16, 1934 (41 U. S. C., secs. 28 to 33), on December 28, 1934, or within the time provided in the Act.

Plaintiff's claim under the Act of June 16, 1934, in connection with his subcontract on the New Castle, Pennsylvania, post office, was mailed by plaintiff at the post office at Royal Oak, Michigan, on the 14th day of June, 1935, within six months from the date of completion of the contract. The claim was received by the Treasury Department at Washington on June 17, 1935, and was denied by the Comptroller General on the ground that it was not filed within the six months' period.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff entered into two subcontracts with A. W. Kutsche and Company to perform certain plumbing, heating, and ventilating work in the construction of post office buildings in Springfield, Ohio, and New Castle, Pennsylvania.

This suit is for the recovery of some sixteen odd thousand dollars for extra expense alleged to have been sustained by plaintiff through his compliance with the National Industrial Recovery Act.

It is not necessary for us to consider the New Castle, Pennsylvania, claim because it was not presented in time. All claims had to be presented by June 15, 1935, and plaintiff's claim was not received by the Treasury Department until June 17, 1935, and therefore did not comply with the statute.

The Springfield claim is for extra costs of material and extra cost of labor. From an examination of the evidence we are satisfied that the increased cost of material used in the Springfield Post Office was due to the enactment of the National Industrial Recovery Act and plaintiff is entitled to recover the $218.52 so expended.

It must be borne in mind that the burden of proof is always on the plaintiff to establish his case by a preponderance of evidence. In this case we have a total failure on the part of the plaintiff to clearly establish what the labor costs were before the passage of the National Industrial Recovery Act and what he had to pay afterwards. Estimates are not enough. Testimony of an estimate of what the labor costs would be before bidding and what they actually were after performance, substracting one from the other, is not establishing by clear proof a loss due to the National Industrial Recovery Act. Especially is it true in this case where plaintiff is the sole owner of the company. No consideration was given to the abnormal working conditions or the unusual delays due to the extensions of time granted the prime contractor. There were other elements of delay for which the Government is not responsible and which were due entirely to improper supervision.

In our judgment, there is a total failure on the part of plaintiff to produce sufficient evidence to establish that the loss sustained by him was due to compliance with the National Industrial Recovery Act and, therefore, no recovery can be had on the increased labor costs.

Judgment will be entered for the plaintiff for the increased costs of material in the sum of $218.52. *Consumers Paper Company* v. *United States*, 94 C. Cls. 713; affirmed, 317 U. S. 595.

It is so ordered.

LITTLETON, *Judge;* and BOOTH, *Chief Justice* (retired), recalled, concur.

WHITAKER, *Judge*, dissenting:

I am unable to agree that the plaintiff is entitled under the proof to recover any amount for increased cost of materials used in the performance of the Springfield Post Office contract. The testimony shows that the cost of materials increased after the passage of the National Industrial Recovery Act. But the only proof that the increase was due to the enactment of this Act is plaintiff's testimony that there was an increase in prices after the passage of the Act, and that he knew of no other reason for the increase except the passage of that Act.

The testimony of the people from whom plaintiff purchased the materials was not introduced, nor is there any competent proof that these people in fact complied with the President's Reemployment Agreement or with the applicable Codes.

Such proof is insufficient to entitle plaintiff to recover. *John E. Sjostrom Co., Inc.*, v. *United States*, 100 C. Cls. 548; *Morris Stein et al.* v. *United States*, No. 44315, decided April 3, 1944. (101 C. Cls. 451.)

MADDEN, *Judge*, concurs in the foregoing opinion.

M. E. GILLIOZ v. THE UNITED STATES

[No. 44869. Decided December 4, 1944]

On the Proofs

Government contract; effective date.—Where in response to the Government's invitation for bids, plaintiff submitted a bid for road construction, which was the lowest bid; and where copies of the formal contract, dated March 30, 1935, were sent to him, which he signed and returned to the Government, together with the required performance bond, both of which were duly acknowledged as of April 1, 1935; and where on account of litigation concerning the right of way for the proposed road the contract could not be signed, and was not signed, on behalf of the Government until December 27, 1935; it is *held* that the effective date of the contract was December 27, 1935.

Same; taxing statute enacted before effective date.—The contract being made in December, 1935, the effect of a taxing statute enacted some months earlier cannot be validly asserted as an element of damage.

Same; provisions of section 3744, Revised Statutes.—Under the provisions of the statute then (1935) in effect (R. S. Section 3744) a Government contract was not effective until "signed by the contracting parties with their names at the end thereof." *St. Louis Hay and Grain Co.* v. *United States*, 191 U. S. 159, affirming 37 C. Cls. 281.

Same; damages for delay not assumed by the Government.—The Government, while still legally free to refrain from binding itself to a proposed contract, would hardly have intended, by signing later, to validate, without any attempt to ascertain their amount, large claims for expenses incurred by the contractor during the time which elapsed before the Government signed the contract.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff.

Mr. Harry D. Ruddiman and *Messrs. King & King* were on the brief.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States residing and in business as a contractor at Monett, Missouri.

2. The defendant on February 19, 1935, invited bids for the construction of approximately 7.31 miles of roadway from Swift Run Gap to Simmons Gap, in Virginia, in the Shenandoah National Park, and designated as Project 3A1. All dates referred to in this and the three succeeding findings were in 1935. Plaintiff submitted a bid. Bids were opened March 21. On March 25 the defendant wrote plaintiff stating that a recommendation for awarding the contract to him had been made, and, anticipating favorable action on the recommendation, copies of the formal written contract were sent to plaintiff with the request that he sign them and return them to the defendant along with the proper bond. The contract was dated March 30. Plaintiff signed the formal contract, furnished the performance bond, and sent them to the defendant. The latter acknowledged receipt of them on April 1.

3. On April 24 the defendant wrote plaintiff stating that the 20-day limit prescribed by the N. R. A. Code had expired without the award of the contract having been made and asked plaintiff if he would accept the award if made within 60 days after March 21. By letter dated April 27 plaintiff replied that he would.

On April 30, the defendant, by letter, notified the plaintiff that his bid was accepted on April 25, 1935, by the Assistant Secretary of the Interior Department, contingent upon execution of the formal contract and bond.

4. The defendant, on May 3, sent a telegram to plaintiff stating that the award of the contract should not have been made at that time because of difficulties concerning transfers of rights of way involving some of the land on which the road was to be built. By letter dated May 7, plaintiff was advised that an appeal had been taken to the Supreme Court of the United States from a decision concerning a portion of the land involved and for that reason the signing of the contract by the Assistant Secretary of the Interior Department had been withheld. On June 18, the defendant wrote plaintiff stating that the contract had not been signed by the defendant because of a question as to the adequacy of the title to the land conveyed by the State of Virginia to the United States and

that the Supreme Court had indicated, just before adjournment, that it would hear the case during the fall session.

5. The case involving title to the land in question, *Via* v. *State Commission on Conservation & Development*, 296 U. S. 549, was decided on November 25. On the following day the defendant advised plaintiff that the litigation involving the land had been terminated successfully, that it was the intention of the Assistant Secretary of the Interior to sign the contract, but before doing so it would be necessary to make certain changes in the contract by including a clause relating to N. R. A. code compliance and a clause relating to compliance with the provisions of the Bituminous Coal Act. On December 4, the plaintiff agreed to these changes and wrote to the defendant, as follows:

> Upon my return from a trip in Kansas and Arkansas, I found your letters of Nov. 26th and Nov. 29th together with memorandum of agreement on the above project. I am today signing the agreement and mailing same to our bonding company for their approval and am asking them to forward it to you without delay.
>
> I purchased about $300,000.00 worth of equipment and kept a crew in readiness to proceed with this work until I was advised that the Supreme Court had adjourned without making a decision on the property in question. In fact, I have been waiting for this information since March 21st, when I was advised that I was the low bidder. Some of the equipment that was purchased for this work is working on another project, but some of the equipment which was not adaptable to anything other than mountain work is still waiting to go to work on this particular job. I hope this will finally settle this matter and that I will hear from you within the near future advising that this job can be started.
>
> In issuing the work order, I do not think it would be advisable to issue instructions that work be started within ten days after receipt of the notice to proceed, as I do not believe anyone could do very much work on this project for at least three months. The only work that could be done would be the clearing and possibly the drilling and shooting of some of the rock and a few of the pipe culverts might be placed, so I hope you will be kind enough to either give me a shut down order when issuing the work order or else advise that the work will not have to be started before March 1st, 1936. I will

leave this to you as you know weather conditions in Virginia better than I do.

I hope to be in Washington or Roanoke before the work is started and will at that time try to see you and go over matters pertaining to this project, as well as other work that is coming up for letting. I met your Mr. Austin at Luray some time ago while going over some other work in Virginia and North Carolina and I was very much impressed with your organization and am positive that everything will move along satisfactorily when we get started and that every one will be satisfied when the work is completed.

Yours very truly,

MEG–s. M. E. Gillioz.

6. The formal contract was signed by the Assistant Secretary of the Interior, as the representative of the defendant, on December 27, 1935, and plaintiff's performance bond was approved that day. On that day the defendant replied to plaintiff's request to defer starting with the work until March 1, 1936, stating that because of the weather at the contract site at that time of the year it was almost impossible for any work to be performed. A copy of the signed contract was sent to plaintiff on January 2, 1936. A copy of the contract is in evidence and made a part hereof by reference. The copy sent to plaintiff was one of the copies signed by him in March 1935, and gave March 30 as the date of the contract. It had attached to it a sheet on which plaintiff agreed to comply with the N. R. A. code and Bituminous Coal Act. This sheet had been signed by plaintiff on December 4, but was undated, except as to its approval by the surety, which was dated December 5.

7. On March 28, 1936, plaintiff sent the following telegram to the defendant:

Could you at this time give me a work order on Project 3A1 Virginia

In answer the defendant, on March 30, 1936, sent plaintiff a notice to proceed with the work and plaintiff acknowledged receipt of the notice the next day. The contractor started work shortly thereafter and completed it within the contract time on November 17, 1937.

Had it not been for the delay occasioned by the litigation referred to in findings 4 and 5, and the consequent postponement of the work, plaintiff could and would have completed the work in the working seasons of 1935 and 1936.

8. The site of the contract work was located in mountainous country. The equipment which plaintiff had at the time he bid on the contract was too light for mountain road work and he disposed of it and ultimately replaced it with new, heavier equipment.

9. Plaintiff learned, from the defendant's letter dated June 18, 1935, that the Supreme Court had adjourned until the fall of 1935 without deciding the law suit referred to in findings 4 and 5. He thereupon obtained, during the latter part of June 1935, about four months' work building a dam at Mountainburg, Arkansas. Some of the new, heavier equipment, which plaintiff had ordered but which had not been shipped out by the factories to the site of the Virginia work, was sent to Mountainburg during the period July 17, 1935, to and including August 27, 1935, for use in building the dam.

10. The following is a list of the new equipment purchased in 1935, with the dates the equipment was ordered and delivered to the plaintiff:

Item No. 1. 2 compressors;

Item No. 2. 6 jackhammers;

Item No. 3. 1 sharpener—Ordered on May 3, 1935, delivery to be made when asked for by plaintiff. Delivery ordered from factory on June 28, 1935, and delivered to plaintiff at Quincy, Illinois, on July 20, 1935. Payment made on delivery date July 20, 1935.

Item No. 4. 2 bulldozers. Ordered on May 3, 1935. Order accepted by factory on June 24, 1935, and delivery to be made when requested by plaintiff. Delivery ordered from factory on June 24, 1935, and delivered to plaintiff at Milwaukee, Wisconsin, on July 24, 1935. Payment made as follows: First payment on delivery date and balance in 12 monthly installments beginning October 1, 1935.

Item No. 5. 6 tractors. Ordered May 3, 1935. Order accepted by factory June 24, 1935. Delivery to be made when requested by plaintiff. Delivery dates of tractors to plaintiff at Milwaukee, Wisconsin, were as follows:

1st tractor July 20, 1935.
2nd tractor July 27, 1935.
3rd tractor August 12, 1935.
4th tractor August 14, 1935.
5th tractor August 26, 1935.
6th tractor August 27, 1935.

Payment for the six tractors was made by plaintiff as follows: First payment on delivery date and balance in 12 monthly installments beginning October 1, 1935.

Item No. 6. 4 crawler wagons. Ordered May 3, 1935. Order accepted by factory June 24, 1935. Delivery to be made when requested by plaintiff. Delivery ordered from factory on June 24, 1935, and delivered to plaintiff at Milwaukee, Wisconsin, on July 29, 1935. Payment made as follows: First payment on date of delivery and balance in 11 monthly installments beginning October 1, 1935.

Item No. 7. 1 type 55 shovel. Ordered May 2, 1935. Order accepted by factory July 2, 1935. Delivery to be made when requested by plaintiff. Delivered to plaintiff at Lorain, Ohio, on July 17, 1935. Payment made as follows: First payment on date of delivery and balance in 11 monthly installments beginning 60 days after delivery date.

Item No. 8. 1 type 77 shovel. Ordered May 2, 1935. Order accepted by factory July 2, 1935. Delivery to be made when requested by plaintiff. Delivery ordered on July 2, 1935, and delivered to plaintiff at Lorain, Ohio, on July 18, 1935. Payment made as follows: First payment made on date of delivery and balance in 11 monthly installments beginning 60 days after delivery date.

Item No. 9, 1 type 77 shovel. Ordered May 2, 1935. Order accepted by factory July 31, 1935. Delivery to be made when requested by plaintiff. Delivery ordered on July 31, 1935, and delivered to plaintiff at Lorain, Ohio, on August 1, 1935. Payment made as follows: First payment made on delivery date and balance in 11 monthly installments, beginning 60 days after delivery date.

The foregoing items, numbered 1 to 9, inclusive, were shipped on plaintiff's order from Quincy, Illinois, Milwaukee, Wisconsin, and Lorain, Ohio, where they were manufactured, to Mountainburg, Arkansas, for use in constructing the dam mentioned in finding 9.

Fair rental values per month for the new equipment described in the nine items were, in 1935 and 1936, as follows:

Item	
1. 2 compressors at $510	$1,020.00
2. 6 jackhammers at $17	102.00
3. 1 sharpener	115.00
4. 2 bulldozers at $105	210.00
5. 6 tractors at $435	2,610.00
6. 4 crawler wagons at $170	680.00
7. 1 type 55 shovel	755.00
8. 1 type 77 shovel	1,040.00
9. 1 type 77 shovel	1,040.00

The fair rental values for the new equipment set forth in this finding and in finding 11 are A. G. C. rates as disclosed by the Associated General Contractors Manual. The rates are based on depreciation, interest on investment, major repairs and overhauling, storage, insurance, and taxes.

Plaintiff claims the rental value of these machines from the date, May 2 or 3, when they were ordered, to the date when he began to use them on the Arkansas job.

Both the parties to the contract knew that work on the project was impracticable during three months of winter, the road-construction season being thus limited to nine months.

New equipment used on the Arkansas project was transported therefrom to the project in Virginia. The freight charges on that transportation were probably greater than would have been the charges for shipping the equipment from the factories to the project in Virginia. The amount of this difference is not satisfactorily proved.

11. The following is a list of the new equipment purchased in 1936, with the dates on which the equipment was ordered and delivered to plaintiff.

Item No. 10. 1 tractor. Ordered April 4, 1936. Order accepted by factory on April 4, 1936. Delivery to be made when requested by plaintiff. Delivery ordered from factory on April 4, 1936, and delivered to plaintiff at Milwaukee, Wisconsin, on April 30, 1936. Payment made as follows: First payment made on July 22, 1936, and balance in 11 monthly installments beginning August 22, 1936.

Item No. 11. 1 blade grader. Ordered September 16, 1936. Allowance of $900.00 granted plaintiff for one

used "60 Cat Tractor" traded in on new grader. Grader shipped to plaintiff on September 25, 1936.

Item No. 12. 2 crawler wagons. Ordered April 4, 1936. Order accepted by factory April 4, 1936. Delivery to be made when requested by plaintiff. Delivered to plaintiff at Milwaukee, Wisconsin, on May 14, 1936. Payment made as follows: First payment July 22, 1936, and balance in 10 monthly installments beginning August 22, 1936.

Item No. 13. 2 compressors. Ordered May 3, 1935. Order accepted by factory April 13, 1936. Delivery to be made when requested by plaintiff. Delivery to plaintiff at Quincy, Illinois, on April 25, 1936. Payment made as follows: First payment made on delivery date and balance in monthly installments.

Item No. 14. 4 wagon drills. Ordered May 3, 1935. Order accepted by factory April 13, 1936. Delivery to be made when requested by plaintiff. Delivered to plaintiff at Quincy, Illinois, on April 25, 1936. Payment made as follows: First payment made on delivery date and balance in monthly installments.

Item No. 15. 1 trailbuilder. Ordered April 23, 1936. Delivery to be made when requested by plaintiff. Order accepted by factory on April 23, 1936. Delivery ordered by plaintiff on April 23, 1936. Delivered to plaintiff at Milwaukee, Wisconsin, on April 30, 1936. Payment made as follows: First payment made on May 5, 1936, and balance in 12 monthly payments beginning June 5, 1936.

Item No. 16. 2 compressors. Ordered May 3, 1935. Delivery to be made when requested by plaintiff. Order accepted by factory on April 13, 1936. Delivered to plaintiff at Quincy, Illinois, on April 25, 1936. Payment made as follows: First payment made on delivery date and balance in monthly installments.

The foregoing items, numbered 10 to 16 inclusive, were shipped from the factories to the project in Virginia.

Fair rental values per month for the new equipment described in the seven items were, in 1936, as follows:

Item	
10. 1 tractor	$435.00
11. 1 blade grader	135.00
12. 2 crawler wagons at $170	340.00
13. 2 compressors at $345	690.00
14. 4 wagon drills at $85	340.00
15. 1 trailbuilder	135.00
16. 2 compressors at $510	1,020.00

12. During the years 1935 and 1936 plaintiff did not rent out any of his equipment to others.

13. Plaintiff claims $2,441.25 of the defendant for the cost of a superintendent and other "steady-time" men for that part of the delay period during which they could not be or were not employed on other remunerative work. This claim is not satisfactorily proved.

14. Because work was carried over to 1936 and 1937 instead of being performed in 1935 and 1936 as anticipated, plaintiff was required to pay the cost or increased cost of certain social security and unemployment insurance, amounting to $1,553.69, no part of which would have been necessary or required had the work been performed in 1935 and 1936.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

On February 19, 1935, the Government invited bids for the construction of some seven miles of roadway in Virginia in the Shenandoah National Park. The bids were opened on March 21, and the plaintiff was the low bidder. On March 25 the Government wrote the plaintiff that he had been recommended for the contract and that, in anticipation that the recommendation would be followed, copies of the formal written contract were enclosed for his signature and return, together with the required performance bond. The formal contract was dated March 30. The plaintiff signed the copies of the contract, obtained the bond, and sent them to the Government, which, on April 1, acknowledged their receipt. Government practice is that, after the contractor has signed and returned the several copies of the contract, the Government, by a contracting officer, signs them and sends one copy back to the contractor. In the instant case there was delay in the signature of the contract by the Government because, as we shall see, there was a question about the title to the right of way for the road.

On April 24 the Government wrote the plaintiff saying that the 20 day period prescribed by the N. R. A. Code for the award of contracts had expired and asking if the plaintiff

would accept the contract if awarded to him within sixty days after March 21, the day the bids had been opened. The plaintiff said in reply that he would, but said that he had incurred expense in preparing for the performance of the contract. On April 30 the Government notified the plaintiff that his bid had been accepted on April 25, contingent upon execution of the formal contract and bond. As we have said, the plaintiff had, in March, signed several copies of the formal contract and furnished the bond.

On May 3, the Government by telegram advised the plaintiff that the contract should not have been awarded because there were unresolved difficulties concerning the acquisition of the right of way. On May 7 the Government wrote the plaintiff that litigation concerning the right of way had been appealed to the Supreme Court of the United States, and that for that reason the contract had not been signed by the Government. On June 18 the Government wrote the plaintiff that the Supreme Court had adjourned for the summer without deciding the question, and that it would be decided in the fall. The case was decided on November 25. The next day the Government wrote the plaintiff that the question of the right of way had been settled, and that the Government was ready to sign the contract except for the fact that it would be necessary to insert in the contract provisions that the plaintiff would comply with the requirements of the N. R. A. Code and the Bituminous Coal Act. 15 U. S. Code 828). On December 4, the plaintiff agreed to these changes, but asked that, on account of the imminence of winter, he be not required to start the work before March 1, 1936.

The Assistant Secretary of the Interior signed the contract for the Government on December 27, 1935, but the plaintiff was not given notice to proceed until March 30, 1936, after he had, on March 28, requested the notice. The contract, when finally signed in December, 1935, still bore the date March 30, 1935. The provisions about the N. R. A. Code and the Bituminous Coal Act were agreed to on an attached sheet not dated, as to the plaintiff and the Government, but which was assented to by the surety on December 5, 1935.

The plaintiff began the work in the spring of 1936 and completed it in the working seasons of 1936 and 1937, within the number of days specified in the contract, which number did not begin to run until after notice to proceed was given.

The plaintiff asserting that he had a contract from April 30, 1935, the date when he was notified that his bid had been accepted, urges that the Government breached the contract, to his damage, by not making available to him the right of way on which the work was to be performed. The asserted elements of his damage are equipment rental, extra freight charges on the shipping of equipment, standby expenses of a superintendent and steady time men who were idle because of the delay, and unemployment insurance and social security taxes which were not in effect in 1935, but which came into effect, the former in 1936 and the latter in 1937.

The Government urges that there was no contract until December 27, 1935, when the formal contract was signed by the Assistant Secretary of the Interior, because of the statutory provision in effect at that time requiring that contracts made by the Department of the Interior be signed "by the contracting parties with their names at the end thereof." It further urges that even in the absence of this statutory provision, the fact that the plaintiff agreed, on December 4, 1935, to changes in the written contract, prevented the contract from being effective before that date. It further says that, because the plaintiff was not in possession of and had not paid the manufacturers for the equipment for which rental is claimed, no rental may be recovered; and that there is no adequate proof of the amount of the increased freight charges, or the existence or amount of cost of steady time superintendence or labor. As to the unemployment insurance and social security taxes, it says that the statutes creating them were enacted in August 1935, to take effect, the former in 1936 and the latter in 1937, and the contract having been made in December 1935, after their enactment, the plaintiff was required to anticipate them and cannot assert them as an unanticipated expense.

We take up first the several elements of the plaintiff's asserted damage. As to the rental value of equipment, the plaintiff claims full rental value from the time he sent his

first orders to the factories on May 2 or 3, 1935, until he put the machines to work, some of them on the Mountainburg, Arkansas job in the summer of 1935 after it was evident that the Virginia job would be delayed for several months, and some of them on the Virginia job after it was started in 1936. The factories did not even accept the orders until some months after they were sent, and some of the orders were not sent by the plaintiff until 1936. None of the machines were to be delivered or paid for until delivery was requested by the plaintiff. He did not request delivery until he was ready to use the machines. They may not even have been manufactured until shortly before delivery was requested and they were delivered. In these circumstances no rental value could be recovered, regardless of the validity or invalidity of the plaintiff's contract with the Government.

The claim for increased freight charges is not proved. Some of the machines, which the plaintiff would have had shipped from Quincy, Illinois, Milwaukee, Wisconsin, and Lorain, Ohio, where they were manufactured, to the Virginia job if that job had been ready, were shipped instead to the Arkansas job, and, when it was completed, to Virginia. The plaintiff presented figures showing that freight rates from Arkansas to Virginia were much higher than those from Lorain, Ohio, to Virginia, disregarding the fact that many of the items did not come from Lorain, but from more distant points in Wisconsin and Illinois.

As to the wages paid to a superintendent and a crew of steady time men whose time was wasted because of the delay in starting the Virginia job, the proof is not adequate to show either that there were such men or that any amount was paid on that account.

It is proved that unemployment insurance and social security taxes were $1,553.69 greater than they would have been if the work could have been done in 1935 and 1936, as the plaintiff expected to do it when he made his bid. Since such increased taxes would be a proper element of damages for a breach of contract by the Government which delayed a contractor and thus subjected him to them, we must consider the legal status of the contract.

Section 3744 of the Revised Statutes, 41 U. S. C. 16, which was repealed in 1941, but was in effect in 1935, contained the following language:

> Except as otherwise provided by law, it shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; * * *.

Because of this statute, the plaintiff could not have sued the Government for breach of contract until the contract was signed by the Assistant Secretary of the Interior on December 27, 1935. *St. Louis Hay and Grain Co.* v. *United States*, 191 U. S. 159, affirming 37 C. Cls. 281. He could, if he had conferred a benefit on the Government in the performance of an unsigned contract, recover the value of the benefit on a *quantum meruit* basis. In the plaintiff's case, the several elements of damages on which he bases his claim did not involve benefits to the Government, but only costs to the plaintiff. This is true even of the social security and unemployment insurance taxes, since so much of the tax money as was paid to the Government was taken by it, not for its benefit, but as a trustee or quasi-trustee for the employees who were to benefit from the Social Security law.

If, then, the contract had remained unsigned, or had been dated in December of 1935, when it was signed, the plaintiff could not recover for damages resulting from the delay in signing it, which damages accrued either before or after it was signed. We have then, the question whether the fact that the contract, when signed, still carried March 30, 1935, as the date of the contract, improves the plaintiff's position. The plaintiff had, as we have seen, signed the contract in March, but had signed the appended sheet agreeing to comply with the N. R. A. Code and the Bituminous Coal Act on December 4. When it was signed by the Government in December, and accepted by the plaintiff, with the noted modification, did the parties intend that rights under the contract

should be determined as if it had been completely executed in March? We think not. The Government, which was still legally free to refrain from binding itself, could hardly have intended, by signing, to validate, without any attempt to ascertain their amount, potentially large claims for delay. And there was nothing in the plaintiff's words or conduct to indicate that he would assert any such claims. He did, naturally, complain of the delay in getting the contract signed so that he could start the work. In spite of the fact that he had signed the contract, back in March, he must have known, and could have ascertained on inquiry, that he was not bound by his signature because of the long and unanticipated delay. He knew that the 60 day period for which he had pledged his bid had expired and that the award made to him within that period had been revoked as improvidently made. His conduct and attitude in the period of delay was that of a man who still wanted the contract and hoped that the Government would get the right of way question settled so that he could go to work. We think that, in the circumstances, the parties contracted as of December, when they finally were clear of the obstacles to the contract, and the work could begin as soon as the weather permitted, and that neither party intended, by refraining from changing the date on the contract, to bring to life potential lawsuits based upon a fiction that the contract had been made many months before one of the parties, i. e., the Government, had been in control of the subject matter so that it could make a contract about it. The contract being made in December, the effect of a taxing statute enacted some months earlier cannot be validly asserted as an element of damage.

Our conclusion is that the plaintiff's petition should be dismissed. It is so ordered.

WHITAKER, *Judge;* Littleton, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ARTHUR L. LOGAN v. THE UNITED STATES

[No. 45395. Decided December 4, 1944]

On the Proofs

Pay and allowances; second lieutenant in Army Air Corps Reserve, with 5 years' service, entitled to pay of first pay period.—Where plaintiff, a second lieutenant in the United States Army Air Corps Reserve, on June 2, 1938, had completed five years active service as a reserve officer therein; and where, for the period from June 2, 1938, to February 19, 1939, he was paid the active duty pay of an officer of the first pay period; it is *held* that under the provisions of the Act of June 10, 1922, as amended, he is not entitled to recover for the difference between the active duty pay of the first pay period and of the second pay period.

Same.—Under the provisions of section 5 of the Act of June 10, 1922 (42 Stat. 625, 628) a second lieutenant in the Reserve Corps is entitled to only one subsistence allowance, since under section 3 (p. 627) he is entitled to the pay of the first pay period, whereas, a second lieutenant of the Regular Army, having 5 years' service, is entitled to 2 subsistence allowances, since he is entitled to the pay of the second pay period.

Same; legislative history of Pay Readjustment Act of 1922.—The legislative history of the Pay Readjustment Act of 1922 indicates that it was the intention of Congress that officers of the National Guard and Reserve Corps were to be placed in pay periods "on the basis of their grade alone, without regard to length of service."

Same; Act of June 15, 1933, relates to National Guard officers alone.—The Act of June 15, 1933, (48 Stat. 153) relates to officers of the National Guard alone.

The Reporter's statement of the case:

Mr. Harry D. Ruddiman for plaintiff. *Messrs. Fred W. Shields* and *King & King* were on the brief.

Mr. J. R. Wilheim, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Capt. Arthur Lawrence Logan, Air Corps, United States Army, accepted appointment as Second Lieutenant, Corps of Engineers Reserve, June 9, 1931. He accepted appointment as Second Lieutenant, Air Corps Reserve, February 24, 1933, thereby vacating his prior com-

mission as Second Lieutenant, Corps of Engineers Reserve. He was promoted to First Lieutenant, Air Corps Reserve, March 12, 1935, and accepted March 16, 1935. He accepted appointment as Second Lieutenant, Air Corps Reserve, January 9, 1938, thereby vacating his prior commission as First Lieutenant, Air Corps Reserve. He was again promoted to First Lieutenant, Air Corps Reserve, February 20, 1939, and accepted on that same date. He was temporarily promoted to Captain, Air Corps, Army of the United States, February 1, 1941, and accepted on that same date.

2. As of October 17, 1941, the plaintiff had the following periods of active duty: From July 19, 1931, to August 1, 1931; from March 1, 1933, to February 28, 1934; from March 2, 1934, to May 28, 1934; from July 2, 1934, to December 31, 1934; from January 2, 1935, to February 28, 1935; from May 6, 1935, to January 8, 1938, and from January 15, 1938, to October 17, 1941.

3. From June 2, 1938, to February 19, 1939, inclusive, the plaintiff as a second lieutenant, Air Corps Reserve, United States Army, received the active duty pay and allowance of an officer of the first pay period.

On June 2, 1938, the plaintiff had completed five years' active service as a Reserve Officer of the United States Army.

4. If the plaintiff is entitled to the active duty pay and allowances of an officer of the second pay period during the period from June 2, 1938, to February 19, 1939, there is due him the sum of $642.82, as computed by the General Accounting Office.

The claim is not a continuing one.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff was a second lieutenant in the United States Army Air Corps Reserve. On June 2, 1938, he had completed five years' active service as a reserve officer therein. For the period from June 2, 1938, to February 19, 1939, he was paid the active duty pay of an officer of the first pay period. He sues to recover the difference between the active duty pay of the first pay period and of the second pay period.

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Section 1 of the Pay Readjustment Act of June 10, 1922 (42 Stat. 625), as amended by the Act of May 31, 1924 (43 Stat. 250), provides for a base pay for commissioned officers of the Regular Army of $1,500 for the first pay period, and $2,000 for the second pay period, and it provides that second lieutenants who have completed five years' service shall be entitled to receive the pay of the second period. Section 3 of that Act provides that reserve officers and officers of the National Guard on active duty with the Army are entitled to receive pay as follows:

> * * * first lieutenant and second lieutenant of the Army shall receive the pay of the * * * second, and first periods, respectively.

Notwithstanding the express provisions of section 3, plaintiff claims that he is entitled to receive the pay of the second period because a second lieutenant of the Regular Army having five years' service is entitled to receive this pay. His claim is based, first, on the ground that sections 5 and 6 of the 1922 Pay Readjustment Act, *supra*, allow to an officer of the Reserve Corps the same allowances that an officer of the Regular Army is entitled to receive. This, if material, is incorrect. Section 5, for instance, provides for allowances depending upon the base pay the officer is entitled to receive. It says:

> * * * To each officer * * * receiving the base pay of the first period the amount of this allowance shall be equal to one subsistence allowance, to each officer receiving the base pay of the second * * * period the amount of this allowance shall be equal to two subsistence allowances, * * *.

Therefore, a second lieutenant in the Reserve Corps is entitled to only one subsistence allowance, since under section 3 he is entitled to the pay of the first period, whereas, a second lieutenant of the Regular Army, having five years' service, is entitled to two subsistence allowances, since he is entitled to the pay of the second period. There is nothing inconsistent between the provisions of sections 5 and 6 and of section 3.

There is nothing equivocal about the provisions of the Act itself, but we may say that our reading of it is supported by

the explanation of the various sections of the bill inserted by the Chairman of the Committee in the hearings on the bill. This explanation stated, in part:

> Section 3 provides that officers of the National Guard and of the reserve forces of any of the services mentioned in the title of the bill, are placed in pay periods on the basis of their grade alone, without regard to length of service. * * *

Plaintiff next says that under section 4 of the Act of June 15, 1933 (48 Stat. 153, 160), National Guard officers are entitled to receive the same pay and allowances as officers of the Regular Army of the same grade and length of service, and that under section 18 of the Act National Guard officers are entitled to the same pay and allowances as reserve officers on active duty and, therefore, he says the pay and allowances of reserve officers must be the same as the pay and allowances of regular officers, on the principle that things equal to the same thing are equal to each other.

We understand plaintiff's argument to be that this Act of 1933 is interpretative of the Act of 1922. Plaintiff, of course, cannot claim that he comes within the provisions of the Act of 1933, because this Act relates not to reserve officers, but to officers of the National Guard alone. He can take advantage of it, therefore, if at all, only as a congressional interpretation of the Act of 1922. Whatever such an argument may be worth in some cases, it avails plaintiff nothing here, because it will be seen that section 4 of the Act of 1933 only applies to National Guard officers ordered to active duty in times of peace for service with the General Staff Corps and the National Guard Bureau, and section 18, providing that National Guard officers shall receive the same pay as reserve officers on active duty, applies to National Guard officers called to active duty in a time of national emergency. Under this Act, therefore, a National Guard officer, called to duty in time of peace for service with the General Staff Corps or National Guard Bureau, is entitled to the same pay as officers of the Regular Army of equal rank and length of service, but when National Guard officers are called to duty in time of war or national emergency they are entitled, not to the same pay as regular officers of the same grade and length of service, but to the pay to which reserve officers are entitled.

There is nothing inconsistent between sections 4 and 18 of the Act of 1933, *supra*.

The Act of June 10, 1922, *supra*, remained in effect until the Pay Readjustment Act of 1942 (56 Stat. 359). This Act gave to reserve officers the same pay as officers of the Regular Army of the same grade and equal length of service. The committee reporting on the Act of 1942 stated:

> * * * Existing law provided that Reserve Officers shall receive the pay of the grade in which serving. However, they should be authorized the pay of a higher period after a minimum length of service on the same basis provided for officers of the regular services.

We think there can be no doubt that under the Act of 1922, which controls plaintiff's right to salary for the period in question, plaintiff is entitled to receive only the pay of the first period. This he has been paid. His petition, therefore, is dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

A. GUTHRIE & CO., INC., JOHN MARSCH, INC., MARK C. WALKER & SON CO., v. THE UNITED STATES

[No. 45424. Decided December 4, 1944]

On the Proofs

Government contract; decision of Chief of Engineers, representing head of department, final and conclusive on interpretation of contract.—Where the Chief of Engineers, representing the Secretary of War, had before him on appeal the proper interpretation of the specifications in connection with a Government contract for construction of a railroad tunnel; it is *held* that under the decisions of the Supreme Court in *United States* v. *McShain*, 308 U. S. 512, and *Plumley* v. *United States*, 226 U. S. 545, his decision is final and conclusive, where it is not shown that his decision was grossly erroneous or given in bad faith.

The Reporter's statement of the case:

Mr. George R. Shields for the plaintiff. *Messrs. John M. Martin, A. Stuart Robertson*, and *King & King* were on the briefs.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Frank J. Keating* was on the brief.

The court made special findings of fact as follows, upon the basis of a stipulation of facts entered into between the parties:

1. That all during the pertinent times hereinafter mentioned, the plaintiff, A. Guthrie & Co., Inc., was and now is a corporation duly organized and doing business under the laws of the State of Minnesota, with its principal place of business in the City of St. Paul, State of Minnesota, and was engaged in construction work.

2. That all during the pertinent times hereinafter mentioned, the plaintiff, John Marsch, Inc., was and now is a corporation duly organized and doing business under the laws of the State of Illinois, with its principal place of business in the City of Chicago, State of Illinois, and was engaged in construction work.

3. That all during the pertinent times hereinafter mentioned, the plaintiff, Mark C. Walker & Son Co., was and now is a corporation duly organized and doing business under the laws of the State of Nebraska, with its principal place of business in the City of Omaha, State of Nebraska, and was engaged in construction work.

4. That at the time of the making of the contract hereinafter mentioned and all during the performance thereof, the said plaintiffs, A. Guthrie & Co., Inc., John Marsch, Inc., and Mark C. Walker & Son Co., did business under the name of Guthrie-Marsch-Walker Company, with a place of business at Chicago, Illinois; that said plaintiffs have now ceased to do business under said name of Guthrie-Marsch-Walker Company; that at all times said plaintiffs owned all of the rights, titles, and interests of every kind that may have been acquired by or accrued to said Guthrie-Marsch-Walker Company.

5. The plaintiffs and the defendant on September 9, 1935, entered into a written contract, which provided that the plaintiffs should furnish all labor and materials and perform all work required for the relocation of the Baltimore & Ohio Railroad—Tygart River Reservoir in strict accordance with the specifications, schedules, and drawings, for the consideration of the unit prices stated in the schedule, pages A, B, and C of the contract. Major W. D. Styer, Corps of Engineers, District Engineer of the United States Engineer Department, War Department, at Pittsburgh, Pennsylvania, signed the contract as the contracting officer on behalf of the defendant.

6. Part of the work required by the terms of the contract was the construction of two tunnels, one designated Knight Tunnel and the other Lane Tunnel.

The plaintiffs planned to construct Lane Tunnel by beginning the excavation at the north end and proceeding with it to the south end until the excavation was completed, and then to place the concrete lining of the tunnel beginning at the north end and proceeding with it to the south end until the concrete lining was completed.

The contractor received notice to proceed with the work on October 18, 1935. Work under the contract was begun on October 19, 1935. The original date designated for completion was February 9, 1937.

7. Paragraphs 1–15, 1–25 (b), 1–35, and 6–12 of the specifications provided:

> 1–15. *Order of Work.*—The work shall be carried on at such places and also in such order of procedure as may be found necessary by the contracting officer, and shall be constructed in every part in strict accordance with the plans and specifications and/or in exact conformity with the location and limit marks, which will be indicated by monuments, stakes, lines, marks or otherwise. The contractor may be required to suspend work at any time when for any reason such marks cannot be followed.
>
> 1–25. (b) Should the contractor fail to maintain the rate of progress which was specified in his bid or as required by these specifications, the contracting officer will require that additional men and/or plant be placed on the work, or a reorganization of plant layout be effected in order that the work be brought up to schedule and so maintained. Should the contractor refuse or

neglect to so increase the number of men and/or plant, or reorganize the plant layout in a manner satisfactory to the contracting officer, the contracting officer will proceed under the provisions of Article 9 of the contract form, P. W. A. 51.

1-35. *Interpretation of Specifications.*—On all questions relating to the acceptability of material or machinery, classification of materials, the proper execution of the work, and the interpretation of the specifications, the decision of the contracting officer shall be final, subject to appeal as provided for in Article 15 of the contract.

6-12. *Mixing and Placing*—(a) *Equipment.*—The contractor shall provide at the site of the work an approved batch-type mixing plant with a minimum capacity of 50 cubic yards of concrete per 8 hours. Adequate equipment and facilities shall be provided for accurate measurement and for control of all materials and for readily changing the proportions of materials to conform to the varying conditions of the work in order to produce concrete of the required uniform strength and workability.

8. On March 6, 1936, the contracting officer wrote the plaintiffs as follows:

> Reference is made to article 9 of your contract in connection with recent lack of progress in prosecuting the work under the contract.
>
> It is reported that certain phases of work called for under this contract are behind schedule and that the present steps which you are taking to prosecute this work will not assure its completion within the contract time. You are directed to take the necessary steps at once to speed up the progress of this work to insure its completion within the time limits of the contract.
>
> It appears that the construction of both tunnels should be under way at present in order to insure the completion of the entire work on time. At present the excavation for the portals of these tunnels is far behind schedule and the small amount of work which is at present being done on the excavation of the portals is not progressing at a rate sufficient to permit the starting of work on the tunnels for several months. It appears that certain of your subcontractors have not sufficient suitable plant and equipment on the job to insure a proper rate of progress and this and the other matters which are holding up the progress of construction must be corrected immediately.

> Your urgent and serious attention is requested in this connection and it is desired that you inform me in writing at the earliest practicable date what steps you intend to take to correct the deficiencies above noted.

The plaintiffs replied to the above letter on March 25, 1936, stating:

> Your letter of the 6th inst. duly received and contents noted. The answer to this letter was somewhat delayed due to the fact that we want to give you some definite information as to what has been done to speed up the excavation of the portals to the tunnels.
>
> We of course realize that the progress on this part of the work is not exactly up to schedule, but we believe that you understand that a good deal of this was caused by the extreme severe weather conditions during the past three months, and an unusual amount of rainfall, together with other conditions beyond our control.
>
> * * * * *
>
> On the north portal of the Lane tunnel between Station 493 and 517, in addition to the 50B 2-yard shovel now working, there will be started a second shovel of 1½-yard capacity with the necessary hauling and drilling equipment, consisting of three new RD8 caterpillar tractors, three new 13-yard wagons, three new 10-yard wagons, two-wagon drills, and a compressor. This new outfit is being rushed to the job and is expected to be in operation about April 1st. Combined outfit should have an output of approximately 90,000 cubic yards per month.
>
> With this additional equipment on the tunnel portals, we hope to increase the output to your entire satisfaction.
>
> * * * * *
>
> With favorable weather conditions, we shall make every effort to push the work as much as possible.

9. The defendant's contracting officer sent the following letter to the plaintiffs on November 25, 1936:

> Referring to your Lane Tunnel Progress Schedule submitted about November 1, 1936, at the time the placing of the concrete backfill was discontinued, it is found that on November 22, 1936, or 22 days after the schedule was put into effect, progress on the headings was 115 feet behind schedule. The benching operation, which was scheduled to start on November 15, 1936, had not yet started, and on November 22, 1936 was 200 feet behind schedule.

It is also noted that, while the rate of progress in the headings as set forth in the schedule continues at the average daily footage of 23.4 feet during the benching operations, your field superintendent states that little or no progress can be made in the north heading while benching is being carried on; and it was only after considerable discussion of the matter that he agreed to carry on both operations simultaneously.

Using the Knight Tunnel as a criterion of progress, it will be remembered that the subcontractors, before starting work, expected to complete the excavation in 30 days. Although drilling was started on the West Portal on June 18, 1936, the full section of excavation was not completed until September 27, 1936, or more than three months later. Work was started on the forms for the West Portal on September 30, 1936, and concreting was not completed until October 19, 1936, a matter of 20 days to erect forms for, and place, 650 cubic yards of concrete. At the east Portal form work was started on November 2, and on November 24 only 400 cubic yards of concrete had been placed. The concrete ballast walls, which must be cured 21 days prior to the erection of the steel lining forms, were not placed soon enough to avoid a delay even though this work could easily have been carried on while tunnel work was in progress.

Both tunnels have, in my opinion, been examples of poor housekeeping; with timbers, ties, rails, steel, and pipe lying around at all times.

It is believed that the only conclusion that can be drawn from the very poor progress in all phases of the work in connection with the construction of the Knight Tunnel, and from the continued inability to follow any progress schedule so far set up for the Lane Tunnel, is that there exists a lack of coordination of the work being done, a lack of proper planning of the work, and a lack of the aggressiveness necessary to expedite the work and push the job to completion within the time specified.

To date this office has made a number of changes in order to expedite work on the tunnels; such as permitting the contractor to bring in tunnel labor; to work labor in excess of 130 hours a month; to discontinue the placing of tunnel backfill; and to remove tunnel lining forms within 36 hours. These changes, which should have speeded up the work, have had little or no apparent effect on the rate of progress.

Regardless of the contractual relations which may exist between the Guthrie-Marsch-Walker Company and the Subcontractors on the tunnel, the Guthrie-Marsch-

Walker Company is responsible for the completion of the tunnels within the contract time. This office is not satisfied with the progress to date, nor with the method of handling the work.

It is hereby requested that the Guthrie-Marsch-Walker Company make the necessary changes to expedite this work and to insure its completion within the contract time.

On December 5, 1936, the plaintiffs answered the foregoing letter as follows:

We have for acknowledgement your letter of Nov. 25th concerning the progress made at the Lane Tunnel under construction on the B. & O. Relocation near Grafton, West Va.

We have checked into this matter very carefully, and it is still our opinion that we can complete this tunnel on time. When this progress schedule was submitted to you recently, it was of course not the intention, and I believe you realize, that it would be hard to follow this daily and weekly, although an effort is being made to accomplish this result. However, conditions are such in this tunnel that occasionally we run into some very dangerous ground, and in order to take every precaution to protect the lives of the workmen engaged at these headings it necessarily slows down the progress, but as stated above, it is still our aim and intention to give you this tunnel on time as promised. In order to accomplish this, we are now making arrangements to purchase another outfit to be installed at the south portal of the tunnel for the excavation of the bench, so that excavation of the bench should proceed from both ends simultaneously. It is also our intention to proceed as long as possible with the heading from both ends.

Arrangements are now being made to follow up the shovel working on the bench on the north end with the construction of the ballast walls as soon as this shovel has sufficiently advanced to get clearance back of the shovel operations. The operation of this particular shovel was necessarily slowed down upon entering into the tunnel on account of bad and dangerous ground at the south end of the extension to the tunnel, but it is our belief that this has been overcome at this time, getting into harder material.

* * * * *

10. On January 13, 1937, the contracting officer wrote the plaintiffs as follows:

> Reference is made to Article 9 of your Contract No. ER–W1101–eng–6, dated September 9, 1935, for the construction of the Relocation of the Baltimore and Ohio Railroad at Tygart River Reservoir, West Virginia, and to Paragraphs 1–15 and 1–25 of the Specifications which form a part thereof.
>
> Paragraph 1–15 of the Specifications provides as follows:
>
> "*Order of Work*.—The work shall be carried on at such places and also in such order of procedure as may be found necessary by the contracting officer, and shall be constructed in every part in strict accordance with the plans and specifications and/or in exact conformity with the location and limit marks, which will be indicated by monuments, stakes, lines, marks, or otherwise. The contractor may be required to suspend work at any time when for any reason such marks cannot be followed."
>
> Paragraph 1–25 of the Specifications provides as follows:
>
> "*Progress, Organization, and Plant*.—(a) The contractor shall employ an ample force of men and provide construction plant properly adapted to the work and of sufficient capacity and efficiency to accomplish the work in a safe workmanlike manner at the rate of progress specified in his bid or as required by these specifications. All plant shall be maintained in good working order, and provisions shall be made for immediate emergency repairs. No reduction in the capacity of the plant employed on the work shall be made except by written permission of the contracting officer. The measure of 'Capacity of the Plant' to be used on the work shall be the actual performance on the work to which these specifications apply. Award of the contract shall not be construed as a guaranty by the United States that the plant listed by the contractor in the bid form is adequate for the performance of the work in the specified time.
>
> "(b) Should the contractor fail to maintain the rate of progress which was specified in his bid or as required by these specifications, the contracting officer will require that additional men and/or plant be placed on the work, or a reorganization of plant layout be effected in order that the work be brought up to schedule and so maintained. Should the contractor refuse or neglect to

> so increase the number of men and/or plant, or reorganize the plant layout in a manner satisfactory to the contracting officer, the contracting officer will proceed under the provisions of Article 9 of the contract form, P. W. A. 51."
>
> From investigation, it appears that with your present methods and equipment the Lane Tunnel will not be completed within the contract time, the tunnel excavation being approximately five months behind schedule time and the tunnel concreting approximately three months behind schedule time; and that, in order that the contract may be completed within contract time it will be necessary to carry out benching and concreting operations at both ends of the tunnel simultaneously.
>
> Therefore, in accordance with Paragraph 1–15 and 1–25 (b) of the Specifications, you are herein directed to place the necessary men and plant at the south end of the tunnel so that benching and concreting operations will be carried out at a rate of progress approximately equal to that which you have proposed for the north end. You are directed to commence concreting operations at the south end not later than February 10, 1937, and to prosecute construction vigorously from both ends until completion of the work.

This letter was answered by the plaintiffs on January 15, 1937, by the following:

> We have received your letter of January 13th, 1937, instructing us to place additional plant and forces at the south end of Lane Tunnel, in order to advance benching and concrete operations at that end.
>
> Immediate steps will be taken to have the equipment necessary to comply with your instructions installed at the earliest date possible.
>
> We believe that our present methods and equipment now being used will enable us to complete Lane Tunnel and the contract within our contract time or contract time as may be extended by claims for additional time now on file. The installation of the additional equipment and forces, and the expense to us of prosecuting construction from both ends of Lane Tunnel will in our opinion, assure the Government of the completion of the contract in advance of our contract time.
>
> Since the benefits of a completion date in advance of our contract time, accrue to the Government, we wish to protest your instructions of January 13th, 1937, as being outside the requirements of our contract, and upon com-

pletion of the work we expect to be reimbursed by you for this additional expense.

The contracting officer replied to the foregoing letter on January 27, 1937, stating:

> Receipt is acknowledged of your letter of January 15, 1937, stating that immediate steps will be taken to comply with the instructions contained in my letter of January 13, 1937. However, you protest these instructions as being outside the requirements of your contract.
>
> The progress which you have made to date does not, in my opinion, indicate that the contract could have been completed within your contract time with the methods and equipment being utilized prior to January 15, 1937. It was therefore deemed necessary to direct that you place the necessary men and plant at the south end of the Lane Tunnel so that benching and concreting operations will be carried out at a rate of progress approximately equal to that you have proposed for the north end.
>
> It is believed that completion in advance of the contract time would be of considerable benefit to you as well as to the Government. However, if it develops that the progress of the work is such that the contract is completed well within the contract time, consideration will be given to your protest and to any claim which you may make for additional compensation for expense involved in the performance of my instructions of January 13, 1937.

11. Item No. 87 of the contract work consisted of certain paving of West Virginia State Highway No. 56, necessitated by the relocation of the railroad. On March 23, 1937, the plaintiffs agreed to the elimination of this work from the contract. The defendant conducted negotiations with the State of West Virginia with a view towards having the State perform the paving. The negotiations were not successful and the plaintiffs performed the paving work as originally planned. Due to the delays caused by these negotiations, the contracting officer extended the time for performing the highway paving work to and including June 10, 1937, which extension of time was accepted by the plaintiffs. The parties agree that this time extension did not extend the time for performing the tunnel work.

12. On May 10, 1937, the plaintiffs wrote to the contracting officer as follows, in part, and presented an invoice in the amount of $29,558.94, representing its claim for the increased cost of excavating and placing the concrete lining of Lane Tunnel by working from both ends of the tunnel instead of from the north end only:

> Reference is made to our letter of January 15th, 1937, to the District Engineer in reply to his letter of January 13, 1937, relative to the installation of additional benching and concreting plant at Lane Tunnel.
>
> * * * * *
>
> Pursuant to our letter of January 15th, we procured the necessary plant to comply with the instructions of the District Engineer, and installed same at the south end of Lane Tunnel. Construction was prosecuted from both ends of Lane Tunnel, whereas it was our plan to drive the tunnel from the north end only. The completion date of Lane Tunnel was advanced by the revised plan of operation and at added expense to ourselves for the benefit of the Government.
>
> * * * * *
>
> The total cost to us of prosecuting the excavation of bench and the placing of concrete from the south end of Lane Tunnel in excess of the cost of these two operations, had we been permitted to prosecute same from the north end, aggregate $29,558.94.
>
> We are submitting an invoice in this amount for payment in accordance with our letter of January 15th * * *.
>
> The bench work in Lane Tunnel was completed on March 17th, 1937 and the concrete work was completed on April 19th, 1937, permanent track having been placed previous to this time, Lane Tunnel was ready for use in an emergency April 19th, and the benefit to the government was established * * *.
>
> From the rates of progress established on benching and placing of concrete, January 16th to April 19th, 1937, it is apparent that our original schedule for prosecuting these operations from the north end, with the plant on hand January 15th, 1937, would have been maintained and the Lane Tunnel completed before the expiration date of our contract * * *.
>
> On January 15th there remained to be excavated 2,025 lin. feet of bench.

The average progress for bench excavation per shovel from January 16th until bench was completed from the north end and bench completed from the south end, was 17.4 lineal feet per day.

Had bench excavation been prosecuted from the north end alone, same would have been completed on May 13th, 1937 using the average progress of 17.4 feet per day.

It was our plan to advance the bench excavation as far as possible following immediately behind with installation of curb and gutter, then, when bench had been advanced far enough ahead to permit the installation of a passing track between bench and concreting operations so as to eliminate interference, start concrete lining operation.

Using the economical concrete set-up installed at north end, and using the average progress of concrete lining poured from the two ends, it is apparent then that we could have started pouring lining from the north end on April 5, 1937, when the bench had been advanced 1,393 feet, and using the three 30-foot steel forms on hand, advanced the concrete lining at the rate of 45 feet per day, completing the concrete lining on May 25, 1937, track being placed behind the concrete operations between pours during that time whenever possible, so as not to interfere with concrete progress.

Since the date of May 25, 1937 is within our contract time, and contract time as may be extended by claims for additional time now on file, and by reference made a part of this claim; and whereas the above sum is the actual cost to us completing the tunnel ahead of schedule and whereas the Government realized a benefit from this early completion date by reason of being able to put the line in use for scheduled train service on April 26, 27, and 28th, 1937, made necessary by an emergency; we ask that we be reimbursed in the amount of this expenditure of money.

On July 12, 1937, the contracting officer replied to the above communication by sending the following letter to the plaintiffs containing his findings of fact regarding plaintiffs' claim:

Reference is made to your letter of May 10, 1937, wherein you present claim in the amount of $29,558.94. Your claim is based on the fact that, because of instructions contained in my letter of January 13, 1937, you increased your construction operations in the South end

of the Lane Tunnel by providing additional labor, plant, and material. Reference is also made to your letter of January 15, 1937, and my reply thereto of January 27, 1937, relative to the subject at hand.

* * * * *

Your letter outlines the following:

That, in accordance with your letter of January 15, 1937, you procured the necessary plant to comply with the instructions in my letter of January 13, 1937, installed the same at the south end of the Lane Tunnel, and prosecuted the work from both ends of Lane Tunnel, whereas it had been your plan to drive the tunnel from the north end only; that, by doing so, the completion date for Lane Tunnel was advanced at an added expense to yourselves and for the benefit of the Government.

That bench work in Lane Tunnel was completed on March 17, 1937, and concrete on April 19, 1937; that permanent track had been placed previous to this time, and that the Lane Tunnel was ready for use in case of emergency on April 19, 1937; that you estimate that working from the north end only, bench operations would have been completed on May 13, 1937, and concrete operations would have been completed on May 25, 1937.

That since the date of May 25, 1937, is within your contract time, or contract time as may be extended by claims now on file, and whereas the sum of $29,558.94 is the actual cost to you for completing the tunnel ahead of schedule, and whereas the government realized a benefit from this early completion date by reason of being able to put the line in use for scheduled train service on April 26, 27, and 28, you request that you be reimbursed in the amount of the expenditures which you have made.

You outline by itemized bill the cost to which you claim you have been put, in the amount of $29,558.94.

I have investigated the conditions outlined in your claim and my findings of facts are as follows:

That the construction of all items of work in the Lane Tunnel, except main track and ballast, was authorized at the beginning of the project. However, you delayed work on the Lane Tunnel until other work progressed to where you could lay track to the north portal, permitting you to deliver your concreting materials by rail rather than by truck.

That, on January 13, 1937, the excavation in the Lane Tunnel was approximately five months behind schedule, and the tunnel concreting was approximately three months behind schedule. I therefore acted under the provisions of paragraph 1–25 of the specifications and,

by my letter of January 13, 1937, directed you to place the necessary men and plant at the south end of the tunnel to start concreting from this end not later than February 10, 1937, and to prosecute construction vigorously from both ends until completion of the work.

That, at the time of the above requirement, the completion date of the contract was set as April 25, 1937. Due to unforeseeable delays encountered in the tunnel, this time was subsequently extended to May 7, 1937.

That, benching operations in the Lane Tunnel were completed on March 17, 1937, and concrete operations were completed on April 19, 1937. This office has estimated that, under normal conditions, maintaining the ordinary rate of progress, and working from the north end of the tunnel only, you could have completed benching operations on May 9, 1937; concrete operations on May 24, 1937; and the entire tunnel on May 31, 1937. This date would have been 24 days subsequent to the date set for completion of the tunnel, namely May 7, 1937.

* * * * *

In view of the conditions outlined above, I find that it was necessary to concrete from both ends of the Lane Tunnel, in order to complete this work within the time allowed by the contract and change orders, and that there is, in my opinion, no justifiable basis for allowing any part of the additional compensation requested by you. Your request for additional compensation in the amount of $29,558.94 is therefore denied.

* * * * *

13. On August 2, 1937, the plaintiffs submitted a written appeal to the Chief of Engineers from the contracting officer's decision.

The Chief of Engineers decided plaintiffs' appeal as follows on May 2, 1938, and sent the decision to the General Accounting Office because the contract work had been completed and final payment had been made to the plaintiffs on August 19, 1937:

The accompanying appeal of the Guthrie-Marsch-Walker Company under its contract No. ER-W-1101-eng-6 for the relocation of the Baltimore and Ohio Railroad near Grafton, West Virginia, and my decision thereon, are submitted for direct settlement.

The instant contract included, among other items, the construction of the so-called Lane Tunnel through which the relocated railroad of the Baltimore & Ohio Railway

Company was to be operated. The contractor received notice to proceed on October 18, 1935, thus fixing the date for completion as February 9, 1937. By the middle of January 1937, the contract time had been extended to April 25, 1937 by the several change orders issued in the interim. Early in January 1937, the contracting officer became convinced by the rate of progress then being maintained by the contractor that the Lane tunnel construction would not be completed within the time specified and that the transfer of the railroad service from its old to its new line would thereby be delayed with consequent expenses to the United States in connection with the completion of the Tygart River Dam. He thereupon addressed to the contractor his letter of January 13, 1937, in which he called to the attention of the contractor the extent to which he was behind his construction schedule and directed that he place the necessary men and plant on the tunnel job to enable excavation and concreting operations to be conducted from both ends, work having been limited theretofore to operations at the north end. By letter of January 15, 1937, the contractor protested the instructions given him and placed the contracting officer on notice that it, the contractor, would expect reimbursement for the additional costs to be incurred as a result of the order. On January 27, 1937, the contracting officer acknowledged receipt of the protest and advised the contractor that, "if it develops that the progress of the work is such that the contract is completed well within the contract time, consideration will be given to your protest and to any claim which you may make for additional compensation for expense involved in the performance of my instructions of January 13, 1937."

The contractor proceeded with the work in accordance with the order of the contracting officer. Subsequent to the middle of January 1937, additional extensions of time on the contract work were granted which in total fixed the completion date as June 10, 1937. These additional extensions of time were granted for causes independent of the tunnel portion of the work. On April 19, 1937, the tunnel construction was sufficiently advanced to permit the operation of the railroad over the new line on an emergency basis and prior to May 7, 1937, the tunnel work was completed. The entire contract work was completed and accepted on June 10, 1937.

By letter of May 10, 1937, the contractor filed with the contracting officer a claim for reimbursement in the amount of $29,558.94 to cover additional costs incurred in

complying with the contracting officer's directive of January 13, 1937. On July 12, 1937, the contracting officer denied the claim and the present appeal of August 2, 1937 is from that decision of the contracting officer.

In his report of October 25, 1937, as supplemented by report of March 2, 1938, the contracting officer concludes that the additional expense incurred by the contractor as a result of his compliance with the contracting officer's order of January 13, 1937, amounted to $22,004.82.

The provision of the specifications on which the contracting officer relied as his authority for his order of January 13, 1937, is found in paragraph 1–25 (b) which reads as follows:

"Should the contractor fail to maintain the rate of progress which was specified in his bid or as required by these specifications, the contracting officer will require that additional men and/or plant be placed on the work, or a reorganization of plant layout be effected in order that the work be brought up to schedule and so maintained. Should the contractor refuse or neglect to so increase the number of men and plant, or reorganize the plant layout in a manner satisfactory to the contracting officer, the contracting officer will proceed under the provisions of Article 9 of the contract form P. W. A. 51."

Upon review of the facts presented, it is my opinion that the contracting officer was justified in his judgment that the contractor would not be able to complete the tunnel construction at such a time as would not delay the completion of the entire contract work and that it was his duty to so advise the contractor and to require the contractor to take such remedial steps as the circumstances dictated; however, it is further my opinion that the contracting officer went beyond the intent of paragraph 1–25 (b) when he specified the detailed method by which the contractor should accelerate his operations; that the work would have been completed within the contract period had the detailed instruction not been given; and that the detailed instructions constituted a change in the specifications within the meaning of article 3 of the contract, as a result of which the United States benefited and for which an equitable adjustment in contract price should be made. I find further that the payment of an additional sum amounting to $22,004.82 constitutes such an equitable adjustment. Settlement in that sum is recommended.

* * * * *

14. The Acting Comptroller General denied the claim on September 2, 1938, and sent the following decision to plaintiffs on that date:

> Your claim No. 0747205 for $22,004.82, representing an additional amount alleged to be due for extra expense incurred in the construction of the Lane, or No. 2 Tunnel under contract No. ER–W1101–eng–6, dated September 9, 1935, has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.
>
> The evidence of record indicates that pursuant to the provisions of the contract, the order to proceed having been received October 18, 1935, the original completion due date of the contract was fixed as of February 9, 1937. The record further shows that on January 13, 1937, at which time the completion due date had been extended by sundry change orders to April 25, 1937, the contracting officer directed a letter to you calling your attention to the fact that the tunnel excavating was some five months behind schedule and the tunnel concreting approximately three months behind schedule and that in order that the contract might be completed within the contract time, directed you to carry out benching and and concreting operations at both ends of the tunnel simultaneously, said letter being issued pursuant to the authority vested in him by paragraphs 1–15 and 1–25 (b) of the specifications included in and made a part of the contract. It is further indicated in the evidence of record that subsequent to the date of issuance of the above described directive letter there were issued extensions, for causes independent of the tunnel work, whereby June 10, 1937, was fixed as the final completion due date of the contract. It is also shown that on April 19, 1937, the tunnel construction was sufficiently advanced to permit emergency operation of the railroad and was completed on or before May 7, 1937, and that the entire contract was completed and accepted on June 10, 1937, the final completion due date.
>
> It is your contention that although admittedly the contracting officer acted within his authority in issuing the directive letter of January 13, 1937, he erred in his judgment, and that the contract would have been completed within the contract time without the installation of the additional plant and workmen as required by said letter and that as a direct result of your compliance therewith you were put to needless and additional ex-

pense in the amount of $22,004.82, for which sum claim is now made.

The directive letter issued by the contracting officer on January 13, 1937, pursuant to contractual authority, was issued for the patent and sole purpose of securing compliance with the time element of the contract, the known date of the contract expiration being April 25, 1937, as of the time of the issuance of said directive letter.

Moreover, the status of the tunnel work on the date of the aforesaid directive letter, the past rate of progress thereon and the fact that the tunnel was not completed until several days after the due date of April 25, 1937, after compliance with the directive letter, would seem to definitely indicate the judgment of the contracting officer in issuing said letter was not only not in error nor in excess of his authority, but sound and proper toward the fulfillment of his contractual duty.

It certainly is not evident from the evidence at hand that the tunnel would have been completed on time (April 25, 1937), had the contracting officer not required the employment of an additional plant and men at the south end of the tunnel to enable excavating and concreting operations to be conducted from both ends, the work having been limited theretofore to operations at the north end. Furthermore, the completion of the tunnel to an acceptance stage prior to the final completion date as extended to June 10, 1937, for the whole contract was incidental when considered in relation to the directive letter of January 13, 1937, and the completion due date as of that time, and does not establish the receipt of a benefit by the United States not already contemplated under the contract sufficient to establish a liability therefor.

In view of all the facts and circumstances, including the express terms of the contract, hereinabove set forth, it appears there is no authority for the payment of your claim.

*   *   *   *   *

15. On October 31, 1938, plaintiffs' attorneys, Messrs. Shackelford & Robertson, sent the following letter to the contracting officer:

We are advised that payment of the above claim in the amount of $22,004.82, which was approved by the Chief of Engineers, has been refused by the General Accounting Office in Washington. There are certain additional

facts and explanatory statements which we feel in fairness to the contractor should go into the record and if you can consistently do so, we would like to have a statement from you, which we may file with the record, showing the following:

That the conditions justifying the extension of the completion date from April 25, 1937, to May 5, 1937, had arisen prior to January 13, 1937.

That if the extensions to May 7, 1937, had not been granted on April 5th, the contractor could have turned the tunnel over for acceptance by April 25th, the day the B. & O. Railway used the tunnel, by throwing in additional men to clean up and remove their plant from the right of way.

That the concrete batching and pouring plant at the north end of Lane Tunnel had ample capacity to mix and pour sufficient concrete to line sixty lineal feet of of the tunnel per day.

That after the excavation was completed the contractor could have used four forms working from the northern end of the tunnel only; and that, by using four forms and working from the northern end only an average of 56 lineal feet per day could reasonably be expected.

That on March 17, 1937, the day the excavation was completed, 312 lineal feet had been poured from north end with two forms and 300 feet at south end with two forms and if three forms had been used at north end instead of two, 456 feet would have been poured by March 17th from north end alone; that this would have left 1,789 feet to be poured after March 17, 1937; and that by the use of four forms from the north end only the remaining 1,789 feet could have been poured in thirty-two days; which would have completed the concreting April 18, 1937.

The contracting officer, on November 10, 1938, answered the above letter as follows:

With reference to your letter of October 31, 1938, my views on the five points raised by you are given as follows:

The extension in contract time from April 25, 1937, to May 5, 1937, was granted by Change Order No. 19. The delay for which this time was granted occurred during the period December 19, 1936, to January 7, 1937, or prior to the issuance of the contracting officer's directive of January 13, 1937.

Had the time fixed for completion of the contract not been extended beyond April 25, 1937, prior to the per-

formance of final construction and clean-up operations at the Lane Tunnel, it seems reasonable to conclude, from a study of the conditions existing at the time, that the work on the tunnel could have been completed by April 25, 1937. Such completion would, however, have necessitated the employing of an additional force of men.

The concrete batching and pouring plant at the north end of the Lane Tunnel had ample capacity to mix and pour sufficient concrete to line sixty lineal feet of the tunnel per day.

That in my report dated October 25, 1937, a copy of which was furnished the contractor for this work, I found that, after excavation had been completed in the Lane Tunnel, 42 lineal feet of concrete lining could reasonably have been placed per day from the north end, using three forms. If an additional form had been procured, and assuming that concrete lining progress would have varied directly with the number of forms used, this could have been increased to 4/3 of 42, or 56 lineal feet per day.

That, by March 17, 1937, approximately 312 lineal feet of concrete lining had been poured from the north end of the tunnel, using two forms, and approximately 300 lineal feet had been poured at the south end, also using two forms. If concreting had proceeded from the north end only, it seems reasonable to conclude that, using three forms, 456 lineal feet of concrete lining could have been poured by March 17, 1937. This would have left 1,789 lineal feet of lining to be poured after March 17, 1937. By using four forms and concreting from the north end only, this lining possibly could have been completed by April 18, 1937. This possibility is determined retrospectively, based on the assumption that concrete lining progress would have varied directly with the number of forms used, up to a maximum of four forms.

16. Originally, the plaintiffs planned to perform the benching or excavation of Lane Tunnel from the north end only. On December 5, 1936, plaintiffs agreed to excavate the tunnel at the south end simultaneously with the excavation of the north end. Up to January 13, 1937, no excavation had been performed at the south end of the tunnel.

Excavation of Lane Tunnel was completed on March 17, 1937. Concrete lining work was started on March 4, 1937, and finished on April 19, 1937, by concreting from both ends of the tunnel and by using four concrete forms. The tunnel, including the track work, was completed on May 1, 1937, and

the tunnel was turned over to the defendant on May 7, 1937, which was the completion date, as extended, of the tunnel. Previous experience had demonstrated that it was not the capacity of the concrete plant at the north end of the tunnel, but the performance of excavation and execution of other operations that limited the rate of concrete placement.

17. On January 27, 1939, plaintiffs requested reconsideration of the decision of the Acting Comptroller General and on June 6, 1939, this decision was sustained by the Comptroller General.

18. After careful consideration and in the studied and honest opinion of the contracting officer and according to his best judgment at that time, that officer issued the letter of January 13, 1937, set out in finding 10 hereof. In the contracting officer's judgment, it was necessary that Lane Tunnel be completed by April 25, 1937, the then known contract expiration date, in order that the Baltimore & Ohio Railroad tracks could be relocated before spring rains and floods, which would cause suspension of service on this line and delay the completion of Tygart River Dam.

In the opinion of the contracting officer, the method of performing the concrete lining work from both ends of Lane Tunnel was the most practical and economical method of performing the work to bring it up to schedule.

Considering the state of the work as of January 13, 1937, and the then contract expiration date of April 25, 1937, the contracting officer considered it was necessary that plaintiffs place the necessary men and plant at the south end of the tunnel so that benching and concreting operations would be carried out at a rate of progress approximately equal to that which the contractor had proposed for the north end in order to bring the work up to schedule and in his honest opinion the work could not have been finished otherwise by April 25, 1937.

19. Up to 1936, the plaintiffs' superintendent in charge of the tunnel work had more than 30 years experience in tunnel construction, and since 1925 had been in charge of various tunnel jobs. If called as a witness, he would testify as follows:

> The plaintiffs' work of building the Lane Tunnel could and would have been completed by May 7, 1937, the con-

tract completion date for this work, by excavating from both ends of the tunnel and by concreting from the north end of the tunnel only. Such construction would have involved pouring concrete from the north end only, using the three sets of forms which the plaintiffs had provided.

20. The work of constructing Lane Tunnel was performed by Boxley Brothers Company, Incorporated, under a contract with the prime contractors. The extra cost of performing the concrete lining work from both ends of the tunnel, over and above the cost of performing that work from one end of the tunnel only, amounted to $22,004.82, which included $5,400 for the fourth concrete form obtained to comply with the orders of the contracting officer contained in his letter dated January 13, 1937.

The court decided that the plaintiffs were entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue to recover $29,558.94 as the extra expense incurred as the result of an order of the contracting officer requiring it to work at both ends of a tunnel known as "Lane Tunnel," instead of at one end, as it was doing. Plaintiffs had a contract with defendant to do certain work connected with the relocation of the Baltimore & Ohio Railroad at Tygart River Reservoir in West Virginia. Included in this work was the building of Lane Tunnel. The original completion date for the tunnel work was February 9, 1937, but on January 13, 1937, the time had been extended to April 25, 1937. It was later extended to May 7, 1937, for causes arising before January 13, 1937.

On January 13, 1937, the excavation work on the tunnel was five months behind schedule, and the work of concreting it was three months behind. On December 5, 1936, plaintiffs had agreed to excavate from the south end simultaneously with the north end, but on January 13, 1937, this work had not begun. In order to insure completion on time the contracting officer ordered plaintiffs on that date to place the necessary men and plant at the south end of the tunnel as well as at the north end, so that excavation and concreting might be carried on simultaneously from both ends. At this time the completion date was only slightly over 3 months off.

Plaintiffs complied, but under protest. They stated that under their present method they thought they could complete the contract on time, and that by the installation of an additional plant and the employment of additional men, as required, the contract would be completed before time. Since, they said, this would be of advantage to the government, plaintiffs notified it they would claim the additional expense entailed.

The tunnel was completed on May 1, 1937, and turned over to defendant on May 7, 1937, the completion date as extended.

Plaintiffs claim the extra expense incident to concreting at both ends at the same time; they admit it was necessary to excavate at both ends at the same time in order to complete the work on time, but they say it was not necessary to concrete at both ends.

The order of the contracting officer was based upon paragraphs 1–15 and 1–25 of the specifications. Paragraph 1–25 (a) of the specifications required the contractors to employ on the job an adequate plant and sufficient men to complete the work on time, and paragraph 6–12 required them to provide "an approved batch-type mixing plant with a minimum capacity of 50 cubic yards of concrete per 8 hours." The contractors had such a plant on the job at the time the order of January 13, 1937 was issued.

However, paragraph 1–25 (b) provided that:

> Should the contractor fail to maintain the rate of progress which was specified in his bid or as required by these specifications, the contracting officer will require that additional men and/or plant be placed on the work, or a reorganization of plant layout be effected in order that the work be brought up to schedule and so maintained. * * *

It was under this authority that the contracting officer acted, the contractors being at the time 5 months behind with the excavating and 3 months behind with the concreting.

This paragraph gave the contracting officer the authority to give the order he gave, if it was in fact necessary, or if it reasonably appeared to be necessary.

At first glance, at least, it appears that it was necessary since by so operating the work was not completed until May

1, 1937, and was not turned over to the defendant until May 7, 1937, the extended completion date. However, the contracting officer, in answer to a letter from plaintiffs' attorneys under date of October 31, 1938, admitted that the tunnel could have been completed at approximately the same time had concreting operations been continued from the north end only, provided the same number of forms had been used. The delay in construction on January 13, 1937 was obviously and admittedly due to the fact the excavation was behind. Any delay in concreting was incident to the delay in excavation. Hence, the remedy for the situation existing on January 13, 1937, was to order excavation only at both ends of the tunnel; apparently it was not necessary to also order concreting at both ends.

The extra cost of ordering concreting at both ends was $22,004.82. This is, however, subject to a deduction of $5,400, which sum it is admitted it would have been necessary to spend to provide sufficient additional concrete forms to have completed concreting in time to have turned over the tunnel by the completion date.

It is, however, admitted that when the contracting officer issued his order of January 13, 1937, he was honestly of the opinion that it was necessary to do not only the excavating but also the concreting at both ends of the tunnel in order to complete the work by the completion date. No arbitrary or capricious action is, therefore, involved, but only an allegedly mistaken, though honest, judgment, resulting in an order which put the contractors to additional expense.

It would appear unnecessary to decide, however, whether such conduct on the part of the contracting officer would render the defendant liable, because of the following:

About 3 days after the tunnel was turned over to the defendant plaintiffs made claim for the extra expense of working from both ends. This claim was denied by the contracting officer, but on appeal was allowed by the Chief of Engineers, who was the authorized representative of the head of the department, in the amount of $22,004.82. He expressed the opinion that the contracting officer was justified in concluding that the work would not be completed on time unless remedial steps were taken, and that he was justified in

ordering such steps to be taken, but that he did not have the right to specify the detailed method by which operations should be accelerated. His order doing so, the Chief of Engineers said, constituted a change in the specifications entitling the contractors to an equitable adjustment under article 3 of the contract.

Evidently the Chief of Engineers had reference to the article of the specifications requiring the use of one concrete mixer. The order requiring the use of two was, he evidently thought, a change in the specifications, entitling the contractor to an equitable adjustment under article 3 of the contract.

Article 1–35 of the specifications provides that "on all questions relating to * * * the interpretation of the specifications, the decision of the contracting officer shall be final, subject to appeal as provided for in article 15 of the contract." Article 15 makes the decision of the head of the department "final and conclusive upon the parties thereto as to such questions."

The Chief of Engineers had before him on appeal the proper interpretation of article 6–12 of the specifications calling for the use of one concrete mixer, and article 1–25 (b) giving the contracting officer the right to require the use of additional men and plant on the work in case it fell behind. He decided that 1–25 (b) did not authorize the contracting officer to specify the use of two.

Under the decisions of the Supreme Court in *United States* v. *McShain*, 308 U. S. 512, and *Plumley* v. *United States*, 226 U. S. 545, this decision is final and conclusive.

In the *McShain* case we said that the decision of the contracting officer and of the head of the department on whether or not the specifications required the use of a gravel backfill over certain drains was not a decision of a question of fact and, being an interpretation of the specifications, was not binding on the parties. The Supreme Court reversed on the authority of the *Plumley* case and of *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387.

This decision is binding on us. Hence, the decision of the Chief of Engineers being on the proper interpretation of the specifications, we must hold that it is final and conclusive.

But the defendant says his decision was so grossly erroneous as to imply bad faith and, hence, is not binding. We do not think so. The contracting officer conceded, as we have stated, that working from one end only the concreting could possibly have been completed on the same day it was completed by working from both ends. This being so, there was ground for the decision of the Chief of Engineers that he was not justified in requiring the use of a mixer at each end, and in holding that this requirement constituted a change in the specifications.

The Chief of Engineers found that an equitable adjustment on account of the change was $22,004.82. However, the plaintiffs concede in the stipulation of facts that this sum includes $5,400 for furnishing a fourth concrete form and they concede that it was necessary to use a fourth form in order to complete the work on time. This amount, therefore, should be deducted from the $22,004.82. Plaintiffs are entitled to recover $16,604.82. Judgment for this amount will be rendered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* WHALEY, *Chief Justice;* and BOOTH, *Chief Justice* (retired), recalled, concur.

CALIFORNIA ELECTRIC CO., LTD., A CORPORATION v. THE UNITED STATES

[No. 45543. Decided December 4, 1944]

On the Proofs

Stamp taxes; liability of issuer of corporate stock.—Under the provisions of Section 800 of Title VIII of the Revenue Act of 1926 and of Schedule A–3 thereof (44 Stat. 9, 99) as amended by Section 723 of the Revenue Act of 1932 (47 Stat. 169), where a corporation accomplishes a transfer of its own stock by issuing new certificates, it is liable for the tax on the transfer of the stock, and is also liable for tax on transfer to it of a "right to receive" from a bank-trustee a stock certificate which the corporation had issued to the bank.

Same; that there was no sale is immaterial.—It is immaterial in the instant case that there was no sale and also that under the provisions of the Trust Agreement involved the transferors

retained equitable ownership of the stock. *Founders General Corp.* v. *Hoey*, 300 U. S. 268, 274; *Franklin Life Insurance Co.* v. *United States*, 93 C. Cls. 259, 266.

Same; transfer of legal title taxable.—Where the bank as trustee transferred back to the stockholders the stock, pursuant to the agreement revoking the trust, there was a transfer of legal title which was taxable under the applicable statutes.

Same; transfer of "right to receive" taxable.—Where by the revocation agreement the equitable owner of the stock transferred to plaintiff the "right to receive" from the bank the certificate which plaintiff had issued to the bank in lieu of the original certificate transferred to the bank by the former owner, the transfer of this "right to receive" was taxable. *Raybestos-Manhattan, Inc.* v. *United States*, 296 U. S. 60, 63, 64.

The Reporter's statement of the case:

Mr. Walter G. Moyle for plaintiff. *Mr. Ernest H. Oliver* on the brief.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* on the brief.

Plaintiff seeks to recover $3,023.66, consisting of documentary stamp tax of $2,592, penalty of $138.96, and interest of $292.70 alleged to have been erroneously and illegally collected with respect to certain shares of plaintiff's stock under Schedule A–3 of section 800, Title VIII, Revenue Act of 1926, as amended by section 723 of the Revenue Act of 1932.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff was a Nevada corporation and maintained its principal place of business at Oakland, California. Its corporate charter lapsed on January 1, 1939. The present suit is brought by the corporation through its former directors as trustees under the authority of Section 65, General Corporation Law of 1925, of the laws of Nevada (Hillyer, Compiled Nevada Laws, § 1664).

2. The taxes in controversy are stamp taxes assessed against plaintiff under the provisions of Section 800, Schedule A–3 of Title VIII, of the Revenue Act of 1926, as amended by Section 723 of the Revenue Act of 1932, for failure to affix and cancel documentary stamps upon the transfer of

certain certificates representing shares of plaintiff's capital stock.

3. Prior to May 26, 1932, Stanley Starr Rice, Charles Daniel Bronson and John Casper Morello each owned 9,000 shares of plaintiff's no-par value stock, or 27,000 shares, out of a total of 33,610 shares of plaintiff's stock at that time issued and outstanding. May 26, 1932, Rice, Bronson, and Morello, each, deposited their 9,000 shares of plaintiff's stock with the Bank of America National Trust and Savings Association in contemplation of preparing a trust agreement to provide that upon the death of the first trustor the survivors shall receive the stock of the deceased trustor in the plaintiff corporation. The agreement was reduced to writing and executed October 17, 1932. A true copy of the trust agreement is Exhibit "A" to the petition.

4. Rice deposited with the bank Certificate No. 10, representing the ownership of 9,000 shares. The certificate so deposited was thereafter endorsed as follows:

> For value received, I hereby sell, assign and transfer unto Bank of America Trust and Savings Assn. for Stanley S. Rice 9,000 shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ______ attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.
>
> Dated November 29, 1932.
>
> (Sgd.) STANLEY S. RICE.

5. Bronson deposited with the bank Certificate No. 11, representing 9,000 shares of the stock of plaintiff. The certificate so deposited was thereafter endorsed as follows:

> For value received I hereby sell, assign and transfer unto Bank of America Trust and Savings Assn., trustee for C. D. Bronson, 9,000 shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ______ attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.
>
> Dated Nov. 29, 1932.
>
> (Sgd.) C. D. BRONSON.

6. Morello deposited with the bank Certificate No. 12, representing 9,000 shares of plaintiff's stock. The certificate was thereafter endorsed as follows:

> For value received I hereby sell, assign and transfer unto ---------- 9,000 shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint Bank of America National Trust and Savings Association, trustee for J. C. Morello attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.
>
> Dated Nov. 29, 1932.
>
> (Sgd.) J. C. MORELLO.

7. The bank on November 29, 1932, presented the certificates described in findings 3 to 6, inclusive, to plaintiff and caused to be issued to it and registered in the name of the bank Certificates Nos. 39, 40 and 41, each for 9,000 shares of the no-par value stock of plaintiff; Certificate No. 39 being registered in the name of the bank as "Trustee for Stanley S. Rice"; Certificate No. 40 being registered in the name of the bank as "Trustee for C. D. Bronson"; and Certificate No. 41 being registered in the name of the bank as "Trustee for J. C. Morello."

8. August 14, 1935, an agreement was entered into by the plaintiff, Blanche Elmira Rice, individually and as guardian of the person and estate of Stanley S. Rice, an incompetent person, J. C. Morello, C. D. Bronson and J. S. Burt, the effect of which was to revoke the agreement of October 17, 1932, referred to in finding 3. A true copy of the agreement is Exhibit "B" to the petition.

9. Pursuant to this agreement of August 14, 1935, the bank, on August 26, 1935, endorsed Certificate No. 39, referred to in finding 7, in the following language:

> For value received we hereby sell, assign and transber unto California Electric Co., Ltd., ------ shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ---- attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.

10. August 26, 1935, the bank endorsed Certificate No. 40 referred to in finding 7, in the following language:

> For value received we hereby sell, assign and transfer unto C. D. Bronson Nine Thousand (9,000) shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ____ attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.

11. August 26, 1935, the bank endorsed Certificate No. 41 referred to in finding 7, in the following language:

> For value received we hereby sell, assign and transfer unto J. C. Morello Nine Thousand (9,000) shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ____ attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.

12. Certificates Nos. 39, 40, and 41 were then delivered by the bank respectively to plaintiff, C. D. Bronson and J. C. Morello.

13. The 9,000 shares, represented by Certificate No. 39, were transferred by the bank to plaintiff for extinguishment and were extinguished. These 9,000 shares had belonged to Rice, who had become an incompetent, and were taken by plaintiff for retirement in satisfaction of indebtedness of Rice paid by plaintiff.

14. Morello died sometime between August 26 and December 16, 1935, and the ownership of his shares of plaintiff's stock passed to Mrs. J. C. Morello, his executrix, by operation of law.

15. December 16, 1935, Mrs. Morello presented Certificate No. 41, referred to in finding 11, to plaintiff with the demand that a new certificate be given her showing registration of the ownership of the shares in her individual name. December 16, 1935, Certificate No. 42, representing 9,000 shares of plaintiff's no-par value stock, was issued and given Mrs. J. C. Morello by plaintiff. This transaction has not been taxed.

16. December 16, 1935, Mrs. J. C. Morello endorsed Certificate No. 42 in the following language:

> For value received I hereby sell, assign and transfer unto C. D. Bronson, 9,000 shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ____ attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises.

The certificate was thereafter delivered by Mrs. Morello to Bronson.

17. Sometime prior to February 6, 1936, Bronson acquired by purchase from A. H. Kuehn an additional certificate representing 1,800 shares of plaintiff's stock.

18. On February 6, 1936, Bronson surrendered to plaintiff Certificate No. 40, referred to in finding 10, Certificate No. 42 referred to in finding 16, and the certificate received by him from A. H. Kuehn, referred to in finding 17. Plaintiff thereupon prepared and delivered to Bronson a new certificate showing registration in his name of 19,800 shares of plaintiff's stock.

19. The Commissioner of Internal Revenue assessed against plaintiff under the provisions of Schedule A–3, Title VIII of the Revenue Act of 1926, as amended by Section 723 of the Revenue Act of 1932, on account of the transfers of its stock, as set out above, a tax of $2,592, of which $1,872 was assessed in June 1936 and $720 in October 1937.

20. Of the total tax, $1,080 was assessed upon transfer of plaintiff's stock by Rice, Bronson and Morello to the bank in November 1932; $360 was assessed upon the transfer from the bank to plaintiff in August 1935; $360 was assessed upon the transfer from the bank to Morello; $360 was assessed upon the transfer from the bank to Bronson; $360 was assessed upon the transfer from Mrs. Morello to Bronson; and $72 was assessed upon the transfer from Kuehn to Bronson. The additional amounts which plaintiff seeks to recover constitute interest and penalties, assessed and paid as a part of the tax, in the amounts set out in findings 22 and 23.

21. December 31, 1936, plaintiff paid to the Collector of Internal Revenue the sum of $42.80 in partial payment of

the first assessment referred to in finding 20, representing a payment of $432 of the tax liability, $9.36 in penalties and $1.44 of interest. The tax thus paid by plaintiff was intended by it to cover the transfers described in findings 16 and 17.

22. February 27, 1939, plaintiff delivered to a deputy collector two checks in payment of the remainder of the assessment against plaintiff in the amount of $2,580.86, representing principal tax liability of $2,160, interest in the amount of $291.26, and penalties amounting to $129.60. The certificate of the Collector of Internal Revenue shows these payments as having been made as follows:

Paid	*Tax*	*Interest*	*Penalty*	*Total*
March 3, 1939	$720.00	$55.42	$36.00	$811.42
March 6, 1939	1,440.00	235.84	93.60	1,769.44

23. August 25, 1939, plaintiff filed a claim for refund of the taxes, penalties, and interest thus assessed and collected in the amount of $3,023.66. The claim was rejected by the Commissioner December 7, 1939.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff insists that it was not subject to assessment for any of the tax in question under section 800, Schedule A–3, Revenue Act of 1926, as amended by section 723 of the Revenue Act of 1932; that these sections do not impose a tax upon other than sales or transfers of legal title to shares of stock, and claims that none of the deliveries or transfers described in the findings, and summarized in finding 20, were taxable sales or transfers of legal title, except the endorsement and delivery of certificate No. 42 by Mrs. Morello to Bronson, finding 17. As to the two last-mentioned transfers, plaintiff insists that it was not liable for the tax and that such transfers were taxable to Bronson or to Mrs. Morello and Kuehn.

Section 800 of Title VIII of the Revenue Act of 1926 (44 Stat. 9) is as follows:

On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected,

> *and paid*, for and in respect of the several bonds, debentures, or *certificates of stock* and of indebtedness, and other documents, instruments, matters, and things mentioned and described in *Schedule A* of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by *any person* who *makes*, *signs*, *issues*, *sells*, removes, consigns, or ships the same, or *for whose use or benefit* the same are made, *signed*, *issued*, *sold*, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax. [Italics supplied.]

The pertinent portion of Schedule A–3 of the Revenue Act of 1926, as amended by Section 723 of the Revenue Act of 1932 (47 Stat. 169) reads as follows:

> Capital stock (and similar interests), sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares of certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (*Whether entitling the holder in any manner to the benefit of such share, certificates, interest, or rights, or not*), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued), 4 cents, and where such shares or certificates are *without par or face value*, the tax *shall be 4 cents* on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share, as the case may be): * * * [Italics supplied.]

It will be seen that section 800 imposes the tax specified in Schedule A for and in respect of certificates of stock and other documents, and for and in respect of other matters and things mentioned in the schedule, and provides that such tax is to be paid by any person who makes, signs, issues or sells certificates of stock, or for whose use or benefit certificates of stock are made, signed, issued, or sold. Schedule A provides, among other things, that sales or deliveries of or

transfers of legal title of shares or certificates of stock, or to rights to subscribe for or to receive such shares or certificates, shall be taxed at 4 cents a share where the shares are without par value, as is the case here.

Prior to October 17, 1932, Rice, Bronson, and Morello deposited a total of 27,000 shares of plaintiff's stock with the Bank of America National Trust and Savings Association (finding 3). November 29 they, respectively, endorsed the certificates to the bank as trustee under a Trust Agreement. By these transfers the bank acquired the legal title theretofore vested in the transferors. On the same day the bank presented the certificates for the 27,000 shares to plaintiff and caused to be issued to it and registered in its name, as trustee, certificate Nos. 39, 40, and 41 for a like number of shares (finding 7). It is immaterial that there was no sale. It is also immaterial that under the details of the Trust Agreement the transferors retained equitable ownership of the stock. *Founders General Corp.* v. *Hoey*, 300 U. S. 268, 274; *Franklin Life Insurance Co.* v. *United States*, 93 C. Cls. 259, 266. The tax of $360 on each of these transfers, totaling $1,080, was therefore properly assessed and collected.

It follows from what has been said above that there was a transfer of legal title when the bank, on August 14, 1935, transferred the stock back to Mrs. Rice, Bronson and Morello (finding 8) pursuant to the agreement revoking the trust. Art. 34, Regs. 71 (1932 ed.) provides that "The following are examples of transactions subject to tax: * * * (b) The transfer of stock to or by trustees. * * *." These transfers were therefore taxable under the statute. By the revocation agreement Mrs. Rice transferred to plaintiff her "right to receive" from the bank the certificate, No. 39, which plaintiff had issued to the bank in lieu of the original certificate transferred to the bank by her husband. The transfer of this right to receive was taxable. *Raybestos-Manhattan, Inc.* v. *United States*, 296 U. S. 60, 63, 64. This was not a "surrender of stock for extinguishment" within the meaning of art. 35 (f) of Regulations 71. No tax was paid by Mrs. Rice, Bronson and Morello on these retransfers by the bank, and a stamp tax in the further sum of $1,080 was assessed against plaintiff.

The next question is whether the tax, penalty, and interest were properly assessed against plaintiff, whose stock is involved in the transfers in question, and whether it is legally liable under section 800, Schedule A–3, for the amounts so assessed.

The facts show that in every instance, except the transfer on August 14 by Mrs. Rice to plaintiff of her right to receive certificate No. 39 from the bank, plaintiff "issued" a new certificate in lieu of the one surrendered to it by the person to whom it had been endorsed and delivered by its former owner or holder (findings 15, 16, and 18). Plaintiff also "signed" each of these certificates before issuance. Under these facts we think plaintiff is liable for the tax, interest, and penalty. In *Raybestos-Manhattan, Inc.* v. *United States*, *supra*, two corporations conveyed, pursuant to a consolidation agreement, their property to a new corporation in return for shares of its stock which were issued direct to the stockholders of the transferor corporations in proportion to their holdings, rather than to the two corporations. The court stated that the transaction was taxable not only on the original issue of shares, but also on the transfers by which the rights of the two corporations to receive such shares were acquired by the stockholders under the agreement. Before discussing the facts, the court said, at p. 61: "Section 800 imposes liability for the tax upon the transferor, the transferee and the corporation whose stock is transferred."

In *United States* v. *Westbrook-Thompson Holding Corp.*, 94 Fed. (2d) 532–534, the court said:

> *The corporation had no interest in the transfer;* and, after the original issue of corporate stock, which issue is separately taxed in Schedule A (2), a corporation commonly has no interest in the transfers of its stock. Unless the transferred certificates be brought to it for reissue, it would usually have no part in or even knowledge of the transfer. In such a case it would be unreasonable to tax it for a transaction it could not control. The words used in *Raybestos-Manhattan* v. *United States*, 296 U. S. 60, 61, 56 S. Ct. 63, 64, 80 L. Ed. 44, 102, A. L. R. 111, "Section 800 imposes liability for the tax upon the transferor, the transferee, and the corporation whose stock is transferred," may not apply to all cases. But we think they apply here. The parties to this transaction

did not have it independently of and without the knowledge of the corporation whose stock was to be transferred. The partnership endorsed the certificates in blank and applied to the corporation for reissued ones in other names, and, after getting them, delivered them to the partners. The Westbrook-Thompson Holding Corporation participated in, in fact accomplished, the transfer by issuing the new certificates. Section 800, 44 Stat. 99, requires payment by any person who "signs or issues" certificates of stock as well as by those "for whose use or benefit the same are made, signed, issued (or) sold." *The corporation here could have refused to issue the new certificates until the tax was provided for.* In the *Raybestos-Manhattan* case, *supra*, the corporation whose stock was transferred was held to pay the tax, although it had no interest in the transfer with reference to which the tax was assessed, it being a transfer from another corporation to its stockholders. The same thing was true in the case of the Automatic Shares Company dealt with in *Founders General Corporation* v. *Hoey*, 300 U. S. 268, at page 271, 57 S. Ct. 457, 458, 81 L. Ed. 639. See, also, *Standard Oil Co.* v. *United States*, 9 Cir., 90 F. 2d. 571. Under the agreed facts there should have been no recovery. The cause is reversed and remanded, with direction to enter judgment accordingly. [Italics supplied.]

In *United States* v. *Revere Copper and Brass Co.*, 100 Fed. (2d) 391, 392, the court in commenting upon the Westbrook-Thompson case said:

In *United States v. Westbrook-Thompson Holding Corp.*, 5 Cir., 94 F. (2d) 532, the court upheld the stamp tax where upon the surrender of corporate stock owned by a partnership, it was reissued in the individual names of the partners. The court held that where a corporation accomplished a transfer of its stock by issuing new certificates, it is liable for the tax on the transfer of the stock.

In the case at bar plaintiff in each instance, as hereinafter stated, issued new certificates of stock, except in connection with the transfer by Mrs. Rice to plaintiff of her right to receive Certificate No. 39 from the bank.

In the case of *In Re Consolidated Automatic Merchandising Corp.*, 90 Fed. (2d) 598, 600, the court said:

The remaining question is whether the corporation that issued the stock direct to the voting trustees be-

came liable under section 800, Schedule A (3) of the Revenue Act of 1926, for the payment of taxes upon transfers of stock by the recipients of the voting trust certificates. In *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60, 61, 56 S. Ct. 63, 64, 80 L. Ed. 44, 102 A. L. R. 111, Justice Stone said that: "Section 800 imposes liability for the tax upon the transferor, the transferee and the corporation whose stock is transferred." It was thought by the District Court that this remark was a dictum and that the terms of the statute do not justify the imposition of a tax for the transfer of the shares on the corporation. Doubtless the remark was not necessary for the decision rendered in *Raybestos-Manhattan Co.* v. *United States*, supra, but we do not share the view that section 800 Schedule A (3) did not render the corporation liable for the tax.

Upon the facts and under the cases cited, plaintiff is not entitled to recover and the petition must be dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* WHALEY, *Chief Justice;* and BOOTH, *Chief Justice* (retired), recalled, concur.

LAURENCE M. MARKS v. THE UNITED STATES

[No. 45702. Decided December 4, 1944]

On the Proofs

Income tax; deduction for losses; date when stock became worthless.—Where it is shown by the evidence that the participating preference stock of International Match Corporation became worthless in fact in 1932, and that in that year the dominant person in its parent corporation committed suicide and an examination in bankruptcy proceedings disclosed that assets were carried at grossly exaggerated or fictitious figures, and immediately thereafter the market value of the stock dropped from $21.25 to 12½ cents and never sold thereafter for a higher price than 27½ cents; it is *held* that the stock became worthless in 1932 and plaintiff is not entitled to recover on the basis that the stock became worthless in 1936.

Same; taxpayer not required to be an incorrigible optimist.—A taxpayer is not required, in order to show worthlessness, to exclude the remote possibility that the stock may have some

slight value in the future. *United States* v. *White Dental Company*, 274 U. S. 398, cited: "A taxpayer is not required to be an incorribible optimist."

The Reporter's statement of the case:

Mr. Allen Trafford Klots for the plaintiff. *Messrs. G. Herbert Semler*, *Edward S. Hand*, and *Winthrop, Stimson, Putnam & Roberts* were on the briefs.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows, upon a stipulation of facts entered into by the parties:

1. The plaintiff, Laurence M. Marks, whose business address is No. 49 Wall Street, New York, New York, was, in the year 1936, and still is, the owner of 3,000 shares of participating preference stock of International Match Corporation, which stock he purchased at a total cost of $141,562.50 as follows:

1925	1,000 shares	$50,262.50
1926	500 shares	25,000.00
1927	500 shares	31,337.50
1931	1,000 shares	34,962.50
		141,562.50

2. On or about March 15, 1937, the taxpayer filed a Federal income tax return for the year 1936 with the Collector of Internal Revenue for the First District of New York, showing a tax liability of $179,973.18, which was paid in quarterly installments as follows:

March 17, 1937	$44,993.31
June 15, 1937	44,993.29
September 15, 1937	44,993.29
December 14, 1937	44,993.29

3. In computing his net income on the aforesaid return the plaintiff did not claim any deduction on account of the cost of said 3,000 shares of participating preference stock of International Match Corporation.

4. On March 8, 1940, the plaintiff filed a claim for refund, Treasury Department Form 843, for $94,973.93 with

the then Collector of Internal Revenue for the First District of New York. The ground upon which said refund claim was based stated as follows:

> Prior to the year 1936 the Taxpayer purchased 3000 shares of the participating preference stock of the International Match Corporation at a total cost of $141,-562.50. This stock became worthless in the year 1936, and the Taxpayer thereby sustained a loss of $141,562.50. The Taxpayer did not claim this loss as a deduction on his 1936 income tax return.
>
> The Taxpayer claims a refund on the ground that he sustained a loss in 1936 in the amount of $141,562.50 by reason of the fact that the above-mentioned stock became worthless in 1936.

5. Plaintiff's claim for refund was referred to a revenue agent who made a reexamination of the plaintiff's books and records in connection therewith. The revenue agent's report, copy of which was transmitted to the plaintiff by letter dated April 25, 1940, from the Internal Revenue Agent in Charge, concluded with the following:

> The claim is rejected for the reason that this office, as per records available, holds that the Participating Preferred Stock of the International Match Co. was worthless in 1932.

The Commissioner of Internal Revenue forwarded to the plaintiff by registered mail a letter dated June 28, 1940, advising that plaintiff's refund claim was disallowed in its entirety.

6. The International Match Corporation, hereafter referred to as International, was incorporated under the laws of Delaware in June 1923. It acquired from the Swedish Match Co. and others the greater part of the entire capital stocks of companies owning over 100 match manufacturing plants in Mexico, Norway, Denmark, Latvia, Finland, Poland, Austria, Hungary, Czechoslovakia, Jugoslavia, Estonia, Philippine Islands, and Turkey, with a daily capacity of more than two billion finished matches, and also the entire capital stock of the Vulcan Match Co., which was the sales company for products of the Swedish Match Co. and its subsidiaries.

7. The original authorized capital stock of International consisted of 900,000 shares of participating preference stock of a par value of $35 each, hereafter referred to as preference stock, and 1,450,000 shares of common stock of no par value. In December 1924, July 1925, and October 1926 issues of 450,000 shares, each, of the preference stock, which was entitled to cumulative dividends at the rate of $2.60 a share annually, and after the payment of a like amount on the common, was entitled to share equally with the common, were offered to the public through the firm of Lee, Higginson & Co. The issue of preference stock in December 1924 was for the purpose of retiring an outstanding issue of debentures in the amount of $15,000,000. On December 17, 1924, and apparently in connection with the issuance of the preference stock in that month, the Swedish Match Co., which at that time was the owner of a majority of the outstanding shares of common stock in International, entered into two related agreements with International and the holders of shares of the preference stock. The two agreements, together, provided:

1. As to Swedish Match Co.:

(1) That it would not, at any time, reduce the number of shares of common stock, owned by it in International, below a majority of the total number of such shares then outstanding unless it should first publish a notice stating its intention so to do and offering and agreeing to purchase, at not less than 120 percent of par value ($35 per share) plus accrued dividends, all shares of preference stock in International which might be presented to it for that purpose within a period of three months of the date of first giving notice;

(2) That it would, from time to time, upon the request of International endorse or cause to be endorsed upon the certificates of preference stock a notation duly executed by it (the Swedish Match Co.) evidencing the agreement referred to in (1) above;

(3) That, so long as it continued to own a majority of the outstanding shares of common stock in International it would not, in any year, pay dividends on any class of capital stock of the Swedish Match Co. in cash, stock or otherwise, at a rate in excess of 12 per cent per annum unless International had paid the full amount of the cumulative preference dividends at the rate of

$2.60 per share per annum on its outstanding shares of preference stock for all previous years; that in case the full amount of these cumulative dividends had been paid by International, the Swedish Match Co. would not pay in any year dividends on any class of its capital stock in cash, stock or otherwise, at a rate in excess of 12 per cent per annum except that such rate of dividends on the capital stock of the Swedish Match Co. might be increased to a rate not in excess of the greater of the following two proportions:

(a) One and two-thirds times the rate of dividends actually paid during the preceding calendar year by International on its preference stock;

(b) One and two-thirds times the rate of dividends which the net earnings and income of International during such preceding calendar year, as shown by a consolidated income account of International and its subsidiary or controlled companies, would suffice to pay on the outstanding shares of preference stock, assuming that these net earnings and income were to be distributed and paid by International as dividends at the rate of $2.60 per share on its outstanding preference stock and at the rate of $2.60 on its outstanding common stock and the balance distributed and paid equally by International share for share on its outstanding preference stock and common stock; and

(4) That, in event the net earnings and income of International for any two successive years as shown by the consolidated income account of International and of its subsidiary or controlled companies should be insufficient to pay the full cumulative dividends at the rate of $2.60 a share on International's preference stock, it (the Swedish Match Co.) would reduce the rate of dividends paid on its own capital stock during the next succeeding calendar year to 1⅔ times the average rate of dividends actually paid by International on its preference stock during the two preceding years; and that the Swedish Match Co. would not thereafter increase the rate of its dividends on the outstanding shares of its capital stock except to the extent of the proportion set out in (3) above.

2. As to International:

That, as soon as practicable after the close of each calendar year, it would have a consolidated income account of itself and of its subsidiary or controlled companies for the preceding calendar year prepared and

mail a copy thereof to the Swedish Match Co. at Stockholm, Sweden, together with a statement signed by the president or vice president of International setting forth:

(1) The number of shares of preference stock and common stock International had outstanding at the beginning and at the end of the last preceding calendar year and of any changes in the amount of the shares of stock of either of said classes outstanding during such year;

(2) The rate of dividends International actually paid during such last preceding calendar year on its outstanding preference stock and common stock; and

(3) The rate of dividends which the net earnings and income of International during such last preceding calendar year, as shown by the consolidated income account of International and its subsidiary or controlled companies, would suffice to pay on the outstanding shares of preference stock on the basis set forth in (3) (b) above among the provisions relating to the Swedish Match Co.

3. As to the holders of preference stock:

Every holder of preference stock, by accepting a certificate therefor, was to become a party to the agreement and entitled to the benefits thereof with the same force and effect as if such holder had personally executed the agreement.

8. The recited consideration to the Swedish Match Co. for entering into the agreements was the agreements of the other parties and the benefits that would accrue to it as the owner of a majority of the outstanding common stock in International, from the sale by International of 450,000 shares of its preference stock to provide funds for the retirement by International of its oustanding 6½ per cent debentures issued about November 1923.

9. The foregoing agreements were signed for the Swedish Match Co. by Ivar Kreuger, as managing director, and for International by F. Atterbert, as vice president.

10. The circulars issued by Lee, Higginson & Co. in connection with the offerings of the preference stock in 1924, 1925, and 1926 each contained a letter addressed by Kreuger to Lee, Higginson & Co. relative to the alleged business history and financial condition of International, as well as to the business history of the Swedish Match Co. The letter

from Kreuger, written in connection with the issue offered in December 1924, contained the following statement:

COVENANTS OF SWEDISH MATCH COMPANY

> The Swedish Match Company, which now owns a majority of the 1,000,000 outstanding shares of Common Stock of the International Match Corporation agrees, that (1) it will not reduce its ownership of said shares below a majority of the amount thereof at any time outstanding, without first publishing notice of its intention so to do and offering to purchase at not less than $42 a share and accrued dividends all Participating Preference Stock presented to it for that purpose within 3 months after the first publication of such notice; and (2) so long as it owns the majority of such outstanding shares of Common Stock, will pay no dividends upon its own capital stock at any higher rate relatively to the dividends then being paid on the Participating Preference Stock of the International Match Corporation than represented by the relation between the present rate of 12% per annum on the stock of the Swedish Match Company and the initial rate of $2.60 per annum on the Participating Preference Stock of the International Match Corporation, unless the Directors of the International Match Corporation, the earnings and income of that Corporation being sufficient for the payment of dividends under this ratio, should for any reason fail to declare such dividends, in which case the Swedish Match Company is not to be restricted in its dividend policy.

The letters written in connection with the issues offered in 1925 and 1926, while containing a statement respecting the Swedish Match Co.'s agreement to buy preference stock in International at a premium, contain no reference to an agreement restricting the Swedish Match Co. in its payment of dividends.

11. In January 1932 there were 12,834 separate holders of preference stock in International.

12. In April 1932 there were issued and outstanding approximately 1,350,000 shares of preference stock in International and 1,000,000 shares of common stock. The class of stock held by American investors, including the plaintiff, was preference stock. Almost all of the common stock was held by the Swedish Match Co., which was a subsidiary of

A/B Kreuger & Toll. The affairs of International, prior to the death of Kreuger, were dominated by him. Kreuger shot himself and died on March 12, 1932.

13. On April 13, 1932, a creditor's bill in equity was filed in the District Court of the United States for the Southern District of New York praying for the appointment of a receiver to conserve the assets of International in the interest of its creditors and stockholders. The corporation filed an answer admitting the allegations of the bill and consenting to the appointment of a receiver. The Irving Trust Co. was appointed receiver in equity on the same day and duly qualified. On April 19, 1932, International filed a voluntary petition in bankruptcy and on the same day was adjudicated a bankrupt by the District Court of the United States for the Southern District of New York. The case was referred to a referee in bankruptcy, Oscar W. Ehrhorn. At the time of the adjudication, the Irving Trust Co. was appointed receiver in bankruptcy. On June 1, 1932, it was elected by the creditors as trustee in bankruptcy and has since been acting in that capacity.

14. The first cash distribution made to the stockholders in International was paid on April 15, 1925, to the holders of preference stock, and the amounts of distributions paid per share on each class of stock for the respective years were as follows:

Year	Preference ($35 par)	Common (no par)	Year	Preference ($35 par)	Common (no par)
1925	$2.10	none	1929	$3.20	$3.20
1926	3.20	none	1930–1931	4.00	4.00
1927	3.20	$1.60	1932	1.00	1.00
1928	3.20	3.20			

15. The last cash distribution paid by International to its stockholders was on January 15, 1932, when $1 a share was paid on each class of stock. Since the corporation's adjudication as a bankrupt, no distributions by way of dividends or otherwise have been made with respect to its preference stock.

16. The preference stock in International was listed and traded on the New York Stock Exchange upon and after the issuance thereof until it was struck off the list of the

Exchange on May 19, 1932, because of the corporation's failure to maintain a transfer office in New York City. The price range per share of the stock on the New York Stock Exchange was as follows:

Year	High	Low	Year	High	Low
1925	\$60⅞	\$56⅝	1931	\$73¼	\$11
1926	66⅜	53½	January, 1932	24⅜	15¾
1927	95½	62	February, 1932	24½	16¾
1928	121⅞	85	March, 1932	21¼	3½
1929	102½	47	April, 1932	4⅝	⅜
1930	92	52¼	May, 1932	⅜	¼

17. After May 1932 sales of the preference stock in International were made through brokers "over the counter" at prices within the following price range per share:

Year	High	Low	Year	High	Low
	Cents	*Cents*		*Cents*	*Cents*
1932	62½	12½	1934	16½	10½
1933	25	17½	1935	27½	11½

18. The following bid and asked prices per share were quoted on the preference stock in International in "over the counter" transactions in New York City, Boston, and Philadelphia in November and December 1932 and January 1933:

Date	Number of Shares	Bid	Asked
Nov. 7, 1932	500	\$0.125	
Nov. 9, 1932	25		\$0.50
Nov. 9, 1932	(1)	.125	.375
Nov. 10, 1932	200	.125	
Nov. 11, 1932	500		.375
Nov. 16, 1932	200		.125
Nov. 16, 1932	200		.25
Nov. 18, 1932	300	.125	
Dec. 5, 1932	100	.0625	.1875
Dec. 7, 1932	(1)	.0625	.1875
Dec. 8, 1932	600		.25
Dec. 9, 1932	100	.125	.25
Dec. 17, 1932	(1)		.1875
Jan. 6, 1933	(1)	.20	.28
Jan. 16, 1933	65		.15
Jan. 19, 1933	400		.20
Jan. 20, 1933	1,000	.05	
Jan. 23, 1933	500	.0625	.1875

[1] Not stated.

19. The following sales of preference stock in International were made at auction on the indicated dates to the highest bidders through Adrian H. Muller & Son, auctioneers in New York City, after at least two advertisements of the proposed sales in the New York Herald Tribune and the

Wall Street Journal, both being papers published in New York City:

Nov. 30, 1932, 361 shares at $10 for the entire lot.
Dec. 28, 1932, 100 shares at $3 for the entire lot.
Dec. 28, 1932, 25 shares at $6 for the entire lot.

20. The following sales of preference stock in International were made at auction to the highest bidders through R. L. Day & Co., auctioneers in Boston, on December 28, 1932:

100 shares at $1 for the entire lot.
500 shares at $3 for the entire lot.
35 shares at $1 for the entire lot.
50 shares at $1 for the entire lot.
100 shares at $3 for the entire lot.

21. During the year 1936, the following firms traded in shares of participating preference stock of International Match Corporation:

A. C. Gebhardt & Co., 11 Broadway, New York City.
William C. Orton & Co., 1 Wall Street, New York City.
Mabon & Co., 50 Broadway, New York City.
Elliot & Wolfe, 52 Broadway, New York City.
Paul D. Sheeline & Co., 24 Federal Street, Boston, Massachusetts.

22. The prices at which transactions in this stock during the period from January 1, 1936, through October 31, 1936, were consummated by the above-mentioned firms and the number of shares traded in at each price are set out below:

	No. of Shares	*Price per Share*
	2468 shares	10 cents
	4712 "	12½ "
	7623 "	15 "
	10166 "	20 "
	4756 "	25 "
	11224 "	30 "
	7935 "	35 "
	2930 "	40 "
	1440 "	45 "
	5330 "	50 "
	4835 "	55 "
	1265 "	60 "
	690 "	62½ "
	100 "	65 "
Total	65474	

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23. The prices at which transactions in this stock during the period from November 1, 1936, through December 31, 1936, were consummated by the above mentioned firms and the number of shares traded in at each price are set out below:

60 shares	1 cent
126 shares	10 cents

24. In the year 1937 A. C. Gebhardt & Co. purchased certificates of deposit for participating preference stock as follows:

February 3, 1937	30 shares at $.05 per share
March 2, 1937	50 shares at $.05 per share

25. During the years 1936, 1937 and 1938 the following firms conducted auction sales at which shares of participating preference stock of International Match Corporation were sold:

R. L. Day & Co., 45 Milk Street, Boston, Massachusetts.
Crockett & Co., 50 Congress Street, Boston, Massachusetts.

26. The above quotations of bid, asked, and sales prices of shares preference stock were before the deduction and payment of transfer taxes and commissions payable by the sellers. The Federal stock tax on the sale or transfer of each 100 shares of preference stock was $1.40 during 1932 and all other years here under consideration. The New York State stock transfer tax on the sale or transfer of 100 shares of such stock was $1.40 during 1932 and to June 1, 1933, and $3 at all subsequent times here pertinent.

27. After May 18, 1932, the usual brokerage commission on a sale of 100 shares of such stock "over the counter" was $2.50 and the cost of selling a like amount of such stock at auction, including the cost of advertising, was in excess of such "over the counter" brokerage commission.

28. In addition to the amount of the preference and common stocks outstanding on April 19, 1932, International had outstanding and unpaid on that date two issues of debentures consisting of $47,430,500 twenty-year 5 percent sinking fund debentures, due November 1, 1947, and $48,979,000 ten-year 5 percent convertible debentures, due January 15, 1941.

It also had other outstanding indebtedness of a substantial amount.

29. Preliminary to the authorization of the issuance of the debentures due January 15, 1941, Kreuger, as president of International, under date of January 14, 1931, addressed a letter to its stockholders containing in part the following:

> The consolidated net earnings of the Corporation and its subsidiaries, after depreciation, available for interest, for the 4 years ended December 31, 1929, averaged $20,124,377 or 4.09 times the $4,912,050 annual interest requirement on total present funded debt including the proposed new issue. For the year 1929 alone, such net earnings were $24,135,266, or 4.91 times this requirement. Net earnings available for dividends, for the year ended December 31, 1929, were $20,623,530, equivalent to $8.77 per share on the combined 1,350,000 shares of Participating Preference Stock and 1,000,000 shares of Common stock now outstanding. Except in isolated cases, the match industry has not suffered from the current general business depression and the consumption of matches during the past year has maintained practically the same rate of increase as in previous years. While final figures for the year are not yet available, results of operations indicate that net earnings of the Corporation for 1930 will be somewhat in excess of those for 1929, even after making provision in 1930 for reducing book value of securities owned to a figure well below market value.

30. The two issues of debentures mentioned above were and are entitled to payment out of the assets of the corporation and its trustee in bankruptcy before any payment or distribution from that source is made to the holders of the preference stock. The following claims of debenture holders were allowed without objection by the trustee in bankruptcy:

5% convertible debentures due Jan. 15, 1941	$48,979,000.00
Interest accrued at the date of bankruptcy	635,656.42
5% sinking fund debentures due Nov. 1, 1947	47,430,500.00
Interest accrued at the date of bankruptcy	1,102,610.91
Total	98,147,767.33

31. The debentures of International were listed and dealt in on the New York Stock Exchange from the time of their issuance until November 1, 1932, when they were struck from

the list of the Exchange because their maturity had been accelerated and there was some question about their negotiability. On November 1, 1932, the quotations on the Exchange per $1,000 face amount of the debentures due in 1947 were $65 bid and $102 asked, and for the same face amount of the debentures due in 1941 were $65 bid and $70 asked. On September 30, 1936, the quotations in New York City per $1,000 face amount of each class of debentures were $122½ bid and $126¼ asked. The foregoing quotations were flat, that is, without the addition of accrued interest.

32. Immediately upon its appointment, the receiver reduced to possession such assets of International as were within the jurisdiction of the United States District Court for the Southern District of New York and made arrangements to have such assets conserved so far as possible, pending the election of a trustee. It found that in excess of 90 percent of the apparent assets consisted of bonds of foreign governments or investments in or advances to subsidiaries or affiliated companies conducting their business outside of the United States. Finding no adequate records of the affairs of such corporations available in the United States it endeavored, through representatives abroad, to ascertain the actual condition of the affairs and assets of International. The Swedish Match Co., a Swedish corporation which owned almost all of the common stock of International, had and now has its principal place of business in Stockholm, Sweden. The Swedish Match Co. owned or controlled match factories throughout the world and was, in turn, controlled by A/B Kreuger & Toll. These three corporations represented a capital investment of approximately $1,000,000,000, over one-fourth of which was paid in by American investors. Kreuger dominated all of the companies and their affairs were conducted under his direction. Following Kreuger's death, the Swedish Government appointed an investigating commission to probe into the affairs of the three corporations and their subsidiaries. The Swedish Commission retained as its accountants, Price, Waterhouse & Co., a firm of accountants of international reputation, which immediately began the preparation of a comprehensive report for the commission with respect to the corporations and their numerous and

affiliated subsidiary companies. Immediately after its appointment, the receiver for International obtained court authorization for the fullest possible cooperation with the Swedish Commission and thereafter it cooperated fully with the commission and its accountants.

33. Under the provisions of the Bankruptcy Act, and in accordance with court authorization, the receiver conducted examinations of officers and directors of International and of other persons, firms and corporations with which International had had dealings. By May 13, 1932, when the receiver submitted its first tentative report to the court, it had learned that the affairs of International were in an extremely complicated condition; that the administration of its estate would be difficult; that immediate and vigorous action by negotiation or by suit was necessary to protect its interests with respect to a number of its assets, as well as in other matters; that adequate legal and accounting representation abroad probably would be required and that certain subsidiary or debtor corporations appeared to have been used by Kreuger as conduits or vehicles for fictitious transactions.

34. As a part of its first tentative report, the receiver submitted the following statement of assets and liabilities of International, as of the close of business April 13, 1932, as disclosed by the unaudited books of account of the company:

ASSETS

Cash:			
Chase National Bank		$2,294.37	
Guaranty Trust Company		20,676.69	
National City Bank		168,330.06	
Lee, Higginson & Company		1.42	
			$191,302.54
Sinking funds for Gold Debentures			613.05
Advances:			
Continental Investment A/G		$74,739,582.91	
Vulcan Match Co., Inc		6,878,424.72	
N. V. Financiele Maatschappij Garanta	$14,875,000.00		
Accrued interest	841,166.66		
		15,716,166.66	
			97,334,174.29
Investments in constituent companies			35,103,048.10

Item			
Investments in foreign Government loans (and accrued interest thereon):			
German Reich 6% External Loan Bonds of 1980	$46,500,000.00		
Accrued interest	733,333.33		
		$47,233,333.33	
Turkish Government 6½% drafts, ($1,500,000 not paid for; see contra)	10,000,000.00		
Less amortization	255,019.85		
	9,744,980.15		
Accrued interest	161,464.14		
		9,906,444.29	
Republic of Guatemala 7% Bonds of 1960	2,238,500.60		
Less amortization	24,115.00		
	2,214,435.60		
Accrued interest	20,572.38		
		2,235,007.98	
			$59,374,785.60
Deferred charges and prepaid expenses:			
Discount and commission on debentures, less amortization		$4,982,675.42	
Prepaid interest		27,988.88	
			5,010,664.30
Total assets			197,014,587.88

LIABILITIES AND CAPITAL

Item	
Liabilities:	
Compania Mexicana de Cerillos y Fosforos	$118,693.48
Accounts payable	28,052.69
Accrued salaries	967.78
H. J. Graffman	787.01
Notes payable	3,800,000.00
Due to Government of Republic of Turkey (see contra)	1,500,000.00
Deferred liabilities	692,500.00
Polish Monopoly Co. (designated in books as "suspense")	167,804.00

Liabilities—Continued.			
Reserve for federal taxes			1, 053, 303. 42
Ten-Year 5% Convertible Gold Debentures, due 1941		$48, 979, 000. 00	
Accrued interest		598, 632. 23	
			49, 577, 632. 23
Twenty-Year 5% Sinking Fund Gold Debentures, due 1947		47, 430, 500. 00	
Accrued interest		1, 073, 773. 82	
			48, 504, 273. 82
Total Liabilities			105, 444, 014. 43
Capital:			
Capital stock:			
Participating preferred stock		$47, 250, 000. 00	
Common stock		30, 000, 000. 00	
Surplus: Paid-in surplus		9, 907, 446. 00	
Earned surplus:			
Balance, January 1, 1932	$4, 017, 279. 58		
Net profit for the period from January 1, 1932, to April 13, 1932 (before income taxes)	395, 847. 87		
		4, 413, 127. 45	
Total Capital			91, 570, 573. 45
Total Liabilities and Capital			$197, 014, 587. 88

35. Relative to the asset item above, "N.V. Financiele Maatschappij Garanta $15,716,166.66", Kreuger owned all of the stock of this corporation, which was not organized for business purposes. It had no office or place of business and no assets except a small bank balance and a claim against Kreuger.

36. The receiver's report did not contain a list or schedule of the various securities constituting the item of "Investments in constituent companies $35,103,048.10." Apparently this item was composed of the following securities which were shown in International's unaudited balance sheet at March 31, 1932, as investment in subsidiary companies:

Shares	Company	Amount
120.000	Continental Investment A/G	$21, 489, 422. 16
2.400	Handelskompagniet Hafnia A/S	1, 032, 667. 48
6, 886	Finska Elektrokemiska A/B	1, 844, 772. 53
10, 000	Vulcan Match Co., Inc	400, 000. 00
1, 000	Bryn & Halden Tandstiksfabrikker A/S	743, 305. 67
1, 500	Bryn-Halden & Nitedals Taendsticksfabrik A/S	1, 431. 399. 58
1, 334	Bjerneborgs Tandsticksfabriks A/B	462, 708. 60
50, 000	Apolka Akcyjna do Eksploatacji Pantswowego Monopolu Zpalczanego w Polsce (Polish Match Monopoly Co.)	2, 579, 000. 00
30, 000	American Turkish Investment Corp	3, 000, 000. 00
133, 508	Drava Aundwarenfabrik A/G	842, 706. 42
29, 983	Drvoresbarksa Twornica Vrbovsko	206. 133. 88
540	Philippine Match Co., Ltd	170, 931. 78
	Total	$35, 103, 048. 10

37. The unaudited balance sheet at March 31, 1932, of Continental Investment A/G, which appeared to be the largest debtor to International, as well as in which it had its largest investment, was as follows:

ASSETS

Cash on deposit		$88, 599. 58
Spanish suspense		27, 830, 600. 00
Investment in and advances to subsidiary and affiliated companies:		
Par or shares:		
1,000 Finska Tandsticksfabrik A/B	$2, 314, 169. 88	
46,500 "Solo" Wien	8, 023, 326. 12	
16,620 "Cia." Arrendataria de Fosforos	6, 915, 915. 16	
58,792 "Solo" Prague	. 19	
208,000 United Plywood & Timber Industries, Ltd	$2, 045, 740. 56	
500 Aug. H. Soini O/Y	10, 670. 00	
40,000 A/S Eesti Tulitikumonopol	1, 285, 380. 00	
789,000 "Hangya" bonds	789, 489. 99	
£345,000.0.0 Roumanian Government 4% bonds	263, 676. 60	
£21,000,000.0.0 "Italian" 6% bonds	102, 000, 500. 00	

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Investment in and advances to subsidiary and affiliated companies—Continued.

Par or shares—Continued.

1,180,850 Fabbriche Riunite de Fiammiferi	$43, 235, 182. 10	
O/Y Savo	200, 537. 28	
Bjorneborgs Tandstickfabrik A/B	286, 394. 54	
Finska Elektrokemiska A/B	268, 536. 71	
Hungarian General Match Mfg. Co	5, 366, 458. 92	
Lettlandische A/G der Zundholzwerke "Vulkan"	103, 972. 49	
		$173, 109, 950. 54
STAB—"Spolka Dividend Account"		223, 880. 00
S. A. France Afrique—"Spanish Dividend Account"		94, 647. 27
Miscellaneous accounts		25, 487. 39
Total assets		$201, 373, 164. 78

LIABILITIES AND CAPITAL

Swedish Match Co	$26, 367, 149. 66
A/B Kreuger & Toll	657, 064. 20
Export A/B Norden	324, 236. 69
N. V. Financieele Maatschappij Kreuger & Toll	1, 519, 816. 37
Szikra Ungarische Bundholzfabrik A/G	9, 126. 89
E. Hartman	2, 207. 24
International Match Corporation	74, 545, 416. 03
Special reserve	9, 909, 422. 16
Reserve for bond valuation	5, 000, 000. 00
Capital stock	11, 580, 000. 00
Surplus	71, 458, 725. 54
Total liabilities and capital	$201, 373, 164. 78

38. The purported assets "Spanish suspense $27,830,600.00" and "£21,000,000.0.0 Italian 6% bonds $102,000,500.00,"

appearing in the foregoing balance sheet, were wholly fictitious and nonexistent.

39. Poor's 1932 Industrial Volume, a well recognized financial trade journal, published about the middle of 1932 an article on International, in which the preference stock as well as the debentures were rated as very speculative investments. In a letter dated October 7, 1932, from the chairman of the protective committee for the holders of preference stock the holders were informed that an investigation then being made by a firm of accountants of the affairs of International, A/B Kreuger & Toll, and the Swedish Match Co. would probably show that the liabilities of International were substantially in excess of its assets.

40. The problem of the trustee in bankruptcy of International and its attorneys and accountants in gathering its assets, ascertaining its true financial condition, and otherwise administering the estate, was extremely difficult. International itself did not own or operate any manufacturing plants, but was a holding company. Its corporate structure involved more than 100 separate corporations scattered throughout the world. On the date of its receivership, its stated (but not actual) capital, bonded indebtedness, and surplus, together with the reported (but not actual) surplus of its subsidiaries constituted a capital structure (including surplus) of more than $260,000,000. International owned all the outstanding capital stock of its foreign subsidiary, Continental Investment A/G and a great many of its investments in foreign subsidiaries, as well as other reported foreign assets, were held by this subsidiary holding company. International's interests and operations were interlocked with those of A/B Kreuger & Toll and the Swedish Match Co., and the three corporations had more than 250 subsidiary companies.

41. In its first and preliminary report to the court dated August 5, 1932, the trustee of International stated that the problems confronting it were made infinitely more complicated because of the deliberate fraud and concealment practiced by Kreuger in connection with dealings between the numerous subsidiaries of the International-Swedish Match Co.—A/B Kreuger & Toll groups.

42. Investigations, made in 1932, demonstrated that the books of International gave a completely false picture of the actual worth of the bankrupt and that the assets, represented as being owned by it, included many fictitious and worthless items, as well as many assets whose value was greatly overstated. It was then further disclosed that assets in very large amounts, recorded in the books, were not in possession of the record holders and that recovery thereof, even where possible, would depend on the outcome of legal proceedings. No unified audit had ever been made of International and of its subsidiaries. The examination of the Kreuger group of companies by Price, Waterhouse & Co. was begun a week after Kreuger shot himself and covered the period from 1917 to March 31, 1932. The final report of the examination, comprising more than 50 volumes, was dated November 28, 1932, and showed that, of the $770,400,000 representing capital investments by the public and advances by banks to those companies, $179,100,000 had been paid out as interest on debentures and as dividends to stockholders; that $115,800,000 had been withdrawn and misappropriated by Kreuger; and that the balance had been invested in government and other securities, and in associated companies within the Kreuger group, as well as in monopoly concessions. The report further showed that, of the published consolidated or book earnings of $316,100,000, the approximate actual earnings were only $40,500,000, or an overstatement of $275,600,000. In addition to the investigation made by Price, Waterhouse & Co., police investigations were made in an effort to uncover assets of the Kreuger group.

43. On June 1, 1932, the Swedish Government granted a moratorium to the Swedish Match Co. for three months in respect of such of its debts as were due on that date, or which might become due during the period of the moratorium. At the same time, it was decreed that, during the period of the moratorium, the company's affairs should be administered by appointees of the Swedish Government. The moratorium, subsequently, was extended and was in force through November 1932. Afterward, for an undisclosed period, the company was operated under a plan approved by its banking creditors. In 1932 A/B Kreuger & Toll was

adjudicated a bankrupt in Sweden, where its affairs were administered by liquidators. It was also adjudicated a bankrupt by the United States District Court for the Southern District of New York on August 6, 1932, and a trustee was appointed for it in that proceeding. The estate of Kreuger was adjudicated bankrupt in Sweden and the public administrator in the County of New York was appointed to administer any assets of Kreuger that were in New York State.

44. The second intermediate report of the trustee, dated February 8, 1933, shows that by the end of 1932 the trustee of International had obtained possession of securities belonging to International and its subsidiaries, having a total cost of approximately $60,000,000, as shown by the books. On January 31, 1933, after the receipt of dividends, interest, etc., including $250,000 received from the sale of trustee's certificates to obtain funds for the administration of the estate and after the payment of various expenses, costs, fees, etc., the trustee had on hand approximately $1,700,000, of which about $1,380,000 had been received from the sale of certain shares of stock in the Diamond Match Co., which was held in a special fund pending final determination of the rights of various claimants in it. The 6 percent bonds of the German Reich, appearing on the books of International, had a par value of $50,000,000, and, after their purchase by International, had been placed in a bank in Berlin for safekeeping. In the fall of 1931, Kreuger, who was president of International, unlawfully removed and placed them with certain Swedish banks as security for his own indebtedness and/or that of A/B Kreuger & Toll and others and for his guarantees of indebtedness of the Swedish Match Co., and A/B Kreuger & Toll to those banks. Prior to January 31, 1933, a settlement of certain litigation involving ownership of the bonds was concluded, subject to court approval, whereunder the trustee would receive $21,000,000 par value of the bonds with July 15, 1932, and subsequent coupons attached thereto. Before the end of 1932 the trustee instituted the following suits: (1) against the directors of International for the recovery of $35,000,000 alleged to have

been paid by them as dividends upon the corporation's stock; (2) against the directors of International for the recovery of approximately $100,000,000 for their negligent acts and conduct in connection with the affairs of the corporation; and (3) against four banks in the United States for the recovery of approximately $4,000,000, claimed by the trustees to have been received as a preference out of the proceeds from the sale of the stock in the Diamond Match Co. heretofore mentioned. The trustee was also considering the bringing of other suits involving various sums. The trustee also had filed claims for the refund of income taxes alleged to have been erroneously paid as follows: 1929, $1,091,108.37; 1930, $1,198,235.52; 1931, $2,500. In addition, a suit had been instituted for a small amount of taxes alleged to have been overpaid in earlier years and a suit instituted by International had also been prosecuted. The trustee had been advised that the United States Government might propose an additional income tax of about $1,000,000 for 1931 on the basis of International's books. This was subsequently done.

45. By January 31, 1933, more than 23,000 claims had been filed against the estate of International. The total face amount of the claims filed upon debentures alone was in excess of the face amount of its outstanding obligations as shown by the books. Among the claims that had been filed against the estate were the following: (1) Swedish bankruptcy liquidators of A/B Kreuger & Toll in the amount of $464,445,330.79; (2) American Trustee in Bankruptcy of A/B Kreuger & Toll, for a like amount; (3) Dutch Kreuger & Toll, $165,000,000; (4) Swedish Match Co. for $112,247,758.53, or a total of $1,206,138,420.11. The claims of these four parties were contested by the trustee, who was of the opinion that the estate of International was a substantial creditor of all four claimants.

46. In its report for the period to January 31, 1933, dated February 8, 1933, the trustee of International expressly refrained from expressing any opinion as to the ultimate value of the estate on the ground that in view of the complexities of the affairs of all of the companies within the Kreuger group, any expression of value at that time would

be premature. The trustee also refrained from expressing an opinion as to the value of International's assets in foreign countries on the ground that it might be misleading.

47. During the year 1936 the trustee effected the following: (1) a settlement of intercompany disputes with the Swedish Match Co. and a sale to it of the match properties of International and of Continental Investment A/G located in the Philippines and in Europe, with the exception of those in Turkey; (2) a settlement with the Swedish liquidators of A/B Kreuger & Toll and with the trustee in bankruptcy of the American estate of that company; (3) settlement of the suits against four banks involving stock in the Diamond Match Co.; and (4) settlement of the suits against the directors of International. During 1936, the last of the claims filed against the estate of International by the Swedish Match Co. and A/B Kreuger & Toll interests were withdrawn, thus reducing the claims against the estate to miscellaneous allowed claims in the amount of $12,380.11, disputed claims aggregating less than $100,000, and claims of debenture holders with interest ($200,000 face amount of the debentures due in 1941 having been surrendered to the trustee and the claim upon them expunged by order of the court in connection with the settlement of the suit against the directors), amounting to $97,748,837.77.

48. Due to the unsatisfactory financial condition of International, and as a means of affording a medium through which the holders of the preference stock could unite and cooperate for the protection of their mutual interests, a Protective Committee was formed with respect to such stock and a protective agreement was executed on April 15, 1932. For a year prior to June 1936 the committee was engaged in negotiations with various persons interested in the affairs of International in an attempt to obtain something of value for the holders of the preference stock. Claims were asserted on behalf of the holders of such stock against the Swedish Match Co., by reason of the alleged rights accruing or that might accrue in the future to such stockholders under the two agreements of December 17, 1924, between the Swedish Match Co., International, and the holders of shares of preference stock in International and described above. The Swed-

ish Match Co. contended that the agreements were entirely invalid and unenforceable.

49. In order to facilitate the settlement of the intercompany claims of International, the Swedish Match Co., A/B Kreuger & Toll and their subsidiaries, and the purchase by the Swedish Match Co. of the European and Philippine assets of International and Continental Investment A/G, heretofore referred to, the Swedish Match Co. offered to provide for settlement of the claims of holders of preference stock in International by making arrangements whereby an offer, which is set forth below, would be made to the holders of the preference stock by a corporation to be organized and to be known as "Imco Participating Company, Ltd.," hereafter referred to as Imco. On April 15, 1936, Imco was incorporated under the English Companies Act of 1929, with its principal place of business in London, England.

50. Pursuant to the efforts of the Protective Committee for the holders of preference stock, and pursuant to the plan whereby Imco was formed, and by which the Swedish Match Co. offered to settle the claims against it on behalf of the preference stockholders, an escrow agreement was entered into between Imco, Continental Investment A/G, A/B Kreuger & Toll (Swedish estate in bankruptcy), and others with Lazard Brothers & Co., Ltd., of London, as escrow agent. In accordance with the terms of the escrow agreement, 675,000 shares of class B stock in the Swedish Match Co. (an amount equal to one-half of total number of outstanding shares of preference stock in International) were deposited with the escrow agent. Of the 675,000 shares, Continental Investment A/G deposited 425,000 shares, A/B Kreuger & Toll (Swedish estate in bankruptcy), 125,000 shares, and Swedish Match Co. caused the remaining 125,000 shares to be deposited. Title to all such shares so deposited remained in the persons depositing them until such shares were sold under the agreement. With respect to the shares deposited by Continental Investment A/G and A/B Kreuger & Toll, which were of a new issue, the Swedish Match Co. agreed to apply for and use its best efforts to obtain permission to deal and/or obtain an official quotation for such shares on the London Stock Exchange.

51. About July 1936 Imco made an offer to the holders of preference stock in International to exchange one of the participating certificates in Imco for each two outstanding shares of preference stock. As a part of the arrangement, the offer was made by Imco sending a copy thereof to all known holders of preference stock and by publishing a notice thereof in one newspaper of general circulation in each of the cities of New York, Boston, Philadelphia, Chicago, and San Francisco and in London once a week for two successive weeks. Imco was to keep the offer open for a period of 90 days and, with the consent of the Swedish Match Co., could keep it open for a further period, not exceeding 90 days. Within 30 days after termination of the offer, Imco was to deliver to the Swedish Match Co. certificates for all preference shares in International which it had received pursuant to the offer. The Swedish Match Co. was not to dispose of such certificates so received except to surrender them for cancellation or to destroy them. In the offer made by Imco and in the plan whereby Imco was organized, it was provided that at any time and from time to time within the period commencing either on the date on which the 675,000 shares of class B stock in the Swedish Match Co. were deposited with the escrow agent, or on the date on which permission to deal in such shares on the London Stock Exchange was granted, whichever was the later date, and terminating on a date one year and 46 weeks after all the 675,000 shares of class B stock were deposited with the escrow agent, or on June 30, 1938, whichever was the later date (developments resulted in June 30, 1938, being the terminating date) each holder of preference stock, accepting the offer and surrendering such preference stock in exchange for participating certificates of Imco, should have the right to direct Imco to cause to be sold by the escrow agent such number of Class B shares on deposit with the escrow agent as should equal one-half the number of preference shares surrendered in exchange for participating certificates in Imco. It was provided, however, that the escrow agent should not sell or cause to be sold in the United States any of the class B shares and that the escrow agent should not sell any of the class B shares at a price per share less than the sterling

equivalent at the London buying rate on the date of sale for 20 Swedish kronor, plus all taxes or stamp duty payable on the share certificates and all commissions payable to the seller's broker and all other expenses of sale. It was also provided that, upon such sale, the escrow agent should pay out of the proceeds of sale 20 Swedish kronor, for each share sold, to the person or persons who deposited the share or shares thus sold (that is, Continental Investment A/G, Swedish Match Co., or A/B Kreuger & Toll, Swedish estate in bankruptcy), and, after deducting the aforesaid taxes and expenses, the holder of the Imco participating certificate directing such sale should receive the balance, if any, of the proceeds of sale. It was further provided that, upon the termination of the period within which the holders of shares in preference stock who had exchanged them for participating certificates could direct Imco to cause the sale of shares of class B stock, all rights of the holders of participating certificates should terminate.

52. The offer made by Imco provided that all actions or claims which the holders of preference stock might then or thereafter have against International or its officers or directors, the trustee in bankruptcy of International, the Swedish Match Co., the persons, firms or corporation which had from time to time engaged in the sale of the preference stock, and any other person, firm or corporation, whether by reason of misrepresentations contained in circulars offering such stock for sale or otherwise, which were predicated upon the retention of such preference stock, would be lost upon acceptance of the exchange offer. In making this offer to the holders of preference stock, Imco stated that it made no representations as to the validity of the two agreements of December 17, 1924, between the Sewdish Match Co. and International and the holders of preference stock in the latter, nor as to whether International and the Swedish Match Co. had performed the several covenants and claims contained in those two agreements, and stated that it was unable to obtain such information necessary to make such representation.

53. By a letter dated June 10, 1936, and by a newspaper advertisement published the following day in New York

City, the holders of preference stock were notified by the protective committee that arrangement had been made whereby the above described offer for the exchange of preference stock for participating certificates in Imco was to be made. In these notices the committee stated that it had long been obvious that International could not satisfy even its creditors in full and that the arrangement respecting the exchange of preference stock for participating certificates in Imco could only be negotiated because of the existence of the agreements of the Swedish Match Co. of December 17, 1924, heretofore described. The committee also expressed the belief that the Imco arrangement was the best that could be made under the circumstances.

54. Under date of October 3, 1936, the protective committee addressed a letter to the holders of certificates of deposit for participating preference stock of the International Match Corporation and holders of such stock. The holders of a total of 923,128 of the 1,350,000 outstanding shares of preference stock accepted the offer of Imco and surrendered such shares in exchange for Imco participating certificates. The plaintiff did not accept this offer and did not exchange his shares of preference stock for Imco participating certificates.

55. From the formation of Imco in April 1936, through December 1937, the bid and asked prices of the Imco participating certificates were as follows:

	Bid	Asked		Bid	Asked
August, 1936	$0.75	$1.00	May, 1937	$1.50	$2.00
October, 1936	.375	.625	July, 1937	1.00	1.50
November, 1936	.30	.50	August, 1937	.75	1.25
December, 1936	.15	.30	October, 1937	.75	.875
February, 1937	.65	.80	November, 1937	.375	.625
March, 1937	1.25	1.625	December, 1937	.50	.75
April, 1937	1.50	1.875			

During the period covered by the foregoing quotations the usual brokerage commission on the sale of 100 Imco participating certificates "over the counter" was $3.

56. Between July 1936, when Imco submitted its offer to the holders of preference stock, and January 3, 1938, there was a total of 15,018 shares of class B stock in the Swedish Match Co. sold at the request of Imco participating certificate holders. All sales were made on the London Stock Ex-

change. These shares were sold in 252 different lots varying in size from 2 shares to 2,000 shares. From the proceeds of the total number of shares thus sold, there was remitted to the holders of Imco participating certificates, the equivalent of $14,969.11 after the payment of brokerage fees, stamps, etc., and the payment of the equivalent of 20 Swedish kronor per share to the owners of the class B stock that was sold. This was an average net amount of 99.67 cents for each participating certificate, or 49.835 cents per share of the preference stock in International which had been exchanged for the certificate. The first sales of class B stock were made on September 28, 1936, and the lowest net amount, per certificate, remitted to an Imco participating certificate holder was from a sale of 5 shares of the stock made on that date. Such remittance was approximately 12 cents a participating certificate or 6 cents per share for the preference stock that had been exchanged for it. The highest remittance from a sale was of 900 class B shares on February 22, 1937. This amounted to $1.755 per certificate, or 87.75 cents per share of preference stock that had been exchanged therefor. Sales of class B stock, by months, with the average net amount per certificate remitted to holders of Imco participating certificates, as well as the average amount per share for the preference stock exchanged therefor, were as follows:

Month	Shares sold	Average net amount per participating certificate	Average net amount for each share of preference stock
September 1936	150	$0.14	$0.07
February, 1937	7,232	.94	.47
March, 1937	1,235	.94	.47
April, 1937	685	1.15	.575
May, 1937	190	.82	.41
June, 1937	406	1.02	.51
July, 1937	782	.98	.49
August, 1937	3,596	1.24	.62
September, 1937	380	.72	.36
December, 1937	332	.33	.165
January, 1938	30	.57	.285

57. After the consummation of the sales to the Swedish Match Co., the principal assets of International at the end of 1936 were as follows:

> Cash remaining after the payment to creditors of a first dividend of 5% and a second dividend of 10% and totaling $14,705,129.46, $6,907,355.27.

$2,460,484.01 face value Republic of Guatemala 7% bonds of 1960. (Interest in default $258,343.56, amortization in default $146,243.57).

$14,255,598 face value notes of the Turkish Republic maturing semi-annually at the rate of $407,302.80 commencing July 1, 1938.

120,000 shares Continental Investment Aktiengesellschaft and account receivable from that company.

100 shares Vulcan Match Co. and account receivable from that company.

30,000 shares of American Turkish Investment Corporation.

Possible equity in fund of $175,000 arising from the sale of Diamond Match Co. stock which is subject to certain applications for compensation.

Special account of $125,000 held subject to the order of the Court.

Possible equity in fund of $12,500 withheld by Swedish Match Co. for payment of Trustee's share (one-half) of taxes payable outside the United States on assets purchased by Swedish Match Co.

Claims filed in other bankruptcy proceedings:

Claim of $1,500,000 allowed in the American and Swedish Bankruptcy proceeding of A/B Kreuger & Toll, subject, in the Swedish proceeding, to a deduction of $185,996.25 from dividends paid.

Claim against the Etate of Krister Littorin, Stockholm, allowed at S. Kr. 18,000,000.

Claim for S.Kr. 325,000,000 allowed against the estate of Ivar Kreuger in Bankruptcy in Stockholm.

Claim for $402,416.35, allowed against the American estate of Ivar Kreuger.

Suit against the United States for refund of income taxes paid in the sum of $2,019,066.80.

The principal assets of Continental Investment A/G were as follows:

Cash	$2, 355, 635. 58
Advances to American Turkish Investment Corporation	100, 000. 00
899,877 shares Swedish Match Co. class B stock stated value	4, 499, 385. 00
Deposit with Swedish Match Co. to cover certain taxes (recoverable portion, if any, unknown)	10, 000. 00
Total	6, 965, 020. 58

58. A plan was prepared by the protective committee for the debenture holders of International and approved by

the independent debenture holders' protective committee for the sale and liquidation of the remaining assets of International other than cash. Pursuant to that plan, a corporation known as "International Match Realization Company, Ltd." hereafter referred to as the Realization Co., was organized and incorporated by act of the Legislature of Bermuda, effective November 3, 1936, for the purpose of purchasing certain assets of the bankrupt estate from the trustee in bankruptcy and realizing on them for the benefit of the debenture holders. The debenture holders, desiring to participate in the plan, were required to assign to the Realization Co., in exchange for voting certificates for shares of its stock, their debentures and all claims against the bankrupt estate of International represented thereby, the debentures to remain alive as assets of the Realization Co. The effect of such exchange was that the Realization Co. was substituted for the former debenture holders as the owner of such debentures and the claims represented thereby.

59. In July, 1937, the following assets of International were sold to the Realization Co. for $7,250,000:

$2,460,484.01 principal amount of the Republic of Guatemala 7% bonds of 1960 comprising 50 bonds each of the denomination of $50,000, numbered 1 to 50 inclusive with March 1, 1934, and subsequent coupons attached.
$36,900 principal amount of Arrears Certificates of the Republic of Guatemala due October 1, 1934, issued in respect of the aforesaid bonds.
$14,255,598 of notes of the Republic of Turkey comprising 35 notes, each having a face value of $407,302.80 maturing serially without interest semiannually, commencing July 1, 1938, and ending on July 1, 1955.
30,000 shares comprising all of the capital stock of American Turkish Investment Corporation a Delaware corporation, and claims of the Trustee in Bankruptcy of International Match Corporation against American Turkish Investment Corporation, amounting to $186,740.36 on June 1, 1937.
120,000 shares comprising all of the capital stock of Continental Investment A.G., a Liechtenstein corporation and the claims of the Trustee in Bankruptcy of International Match Corporation against Continental Investment A. G., in the amount of $69,087,906.22 and Swiss francs 138,493,417.

60. At the time of the foregoing sale, the cash item of $2,355,635.58, heretofore shown as among the principal assets of Continental Investment A/G at the end of 1936, apparently had been paid to the trustee of International on account of indebtedness owing to it since, at the time of the sale, the

assets of Continental Investment A/G consisted of only 785,774 shares of class B stock in the Swedish Match Co. Of such shares, 310,774 were listed on the London Stock Exchange and deposited in escrow, subject to sale at the direction of holders of participating certificates of Imco Participating Co., Ltd., as is explained more fully hereinbefore. The remaining 475,000 shares were not so deposited nor listed on the Exchange nor subject to sale, but the Swedish Match Co. had agreed to use its best efforts to obtain and maintain such listing at its own expense.

61. Of the principal assets of International on hand at the end of 1936, there remained the following with their respective maximum realizable values after the above mentioned sale in July, 1937:

100 shares of Vulcan Match Co. and accounts receivable from that company	$1,584,010.77
Possible equity in fund of $175,000 arising from the sale of Diamond Match Co., subject to certain applications for compensation	175,000.00
Special account held subject to order of the court	125,000.00
Possible equity in fund of $12,500 held by Swedish Match Co. for payment of taxes outside the United States	12,500.00
Claim allowed in the American and Swedish Bankruptcy proceedings of A/B Kreuger & Toll	1,314,003.75
Claim allowed against the estate of Krister Littorin	23,220.00
Claim allowed against the estate of Ivar Kreuger in bankruptcy in Stockholm	419,250.00
Claim allowed against the American Estate of Ivar Kreuger	2,012.08
Suit against the United States for refund of income taxes paid	2,019,066.80
Total	5,674,063.40

62. By December 31, 1936, the trustee had received cash in the total amount of $23,631,410.79 (before the payment of administration, other expenses and the payment of dividends to creditors). This amount, plus receipts from the sale of assets to the Realization Co., the payment by Continental Investment A/G on its indebtedness and the maximum realizable value of remaining assets, totals $38,911,-109.77 as the approximate aggregate value of the bankrupt's estate without deduction of $2,010,751.34, representing disbursements to the end of 1936 for administration expenses and other purposes, except the payment of preferred claims and dividends to general creditors, or an approximate net

value of $36,900,358.43. By subtracting the latter amount from the $97,948,837.77, the amount of allowed claims of debenture holders, a deficiency of $61,048,479.34 is disclosed in assets necessary to pay the allowed claims of creditors entitled to priority over the preference stock.

63. To June 1, 1942, the trustee of International had been authorized to and had paid to the debenture holders dividends as follows on each $1,000 face value of debentures: December 20, 1935, $50; October 20, 1936, $100; July 16, 1937, $50; August 16, 1937, $74; August 22, 1939, $30; August 7, 1940, $20; or a total of $324. As a result of these payments there remains due and unpaid on each such $1,000 of debentures, the principal amount of $676, plus accrued interest.

64. The participating preference stock of International Match Corporation became worthless in 1932. It did not become worthless in 1936.

The court decided that the plaintiff was not entitled to recover.

Whitaker, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover $94,973.33 alleged to have been an overpayment of income taxes for the year 1936. In making his return for this year he claimed no deduction on account of a loss alleged to have been sustained in the participating preference stock in the International Match Corporation, but subsequently he filed a claim for refund therefor, alleging that in the year 1936 this stock had become worthless and that in that year he had lost his entire investment in it amounting to $141,562.50. The defendant says the stock became worthless in a year other than 1936.

The International Match Corporation was a subsidiary of the Swedish Match Company, which in turn was owned by A/B Kreuger & Toll. A/B Kreuger & Toll was owned and controlled by Ivar Kreuger.

Ivar Kreuger shot himself and died on March 12, 1932. This caused an investigation of the affairs of the companies he controlled. About a month after his death, on April 13, 1932, a creditor's bill was filed in the District Court for the

United States for the Southern District of New York, praying for the appointment of a receiver for the International Match Corporation. Less than a week later this company filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. The Irving Trust Company was appointed as trustee.

According to the first tentative report of the receiver the books of this company showed total assets of $197,014,587.88, and total liabilities, exclusive of capital and surplus, of $105,444,014.43. Many of the assets listed, however, were grossly overvalued and some were purely fictitious. For instance, among the assets carried on the books was one of $15,716,166.66, an advance to N. V. Financiele Maatschappij Garanta. Apparently this corporation was organized merely as a cloak for some of Kreuger's activities; it had no office or place of business and no assets, except a small bank balance and a claim against Kreuger, which was absolutely worthless. Another asset listed was one of $74,739,582.91, an advance to Continental Investment A/G, one of the Kreuger companies. Included among the $35,103,048.10 representing investments in constituent companies was an item of $21,-489,422.16 representing the company's stock holdings in the Continental Investment A/G. The books of the Continental showed total assets of $201,373,164.78, which was several million dollars in excess of its liabilities, but included among the assets were two items which were wholly fictitious. One was $27,830,600 "Spanish suspense," and another was $102,-000,500.00 representing "£21,000,000.0.0 'Italian' 6% bonds." These items did not exist. Another asset carried on the books was $46,500,000 of German Reich 6% External Loan Bonds of 1980, plus interest. These had been misappropriated by Kreuger and pledged with Swedish banks to secure his own indebtedness and that of some of his companies on which he was endorser.

The affairs of the International Match Corporation and its affiliated companies were in a state of the utmost confusion, but in 1932 it was quite apparent to all who had any knowledge of the situation that there was every probability that the assets of the company would be insufficient to pay its debts and that its stock was, therefore, without value. For

instance, the protective committee for the preference stockholders informed these stockholders on October 7, 1932, that the investigation of the affairs of the International Match Corporation and its affiliates "will probably show that International Match Corporation's liabilities are substantially in excess of its assets." The lawyer and public accountant who represented the trustee in bankruptcy testified that in 1932 it appeared that the assets would lack about $30,000,000 of paying the debenture holders. Further investigation of the affairs of this company finally disclosed that its liabilities were some $61,000,000 in excess of its assets.

Whatever may have been thought of the value of the stock in this company in 1932, subsequent events proved it to be in fact worthless in that year.

It is, of course, true that stock which is in fact worthless may have a value on the market, and, if so, cannot be said to be worthless for income tax purposes. The market value of the International stock had fluctuated greatly prior to Kreuger's death. In 1925 it sold for a high of $60⅞; in 1926 at $66⅜; in 1927 at $95½; in 1928, $121⅞; in 1929, $102½; in 1930, $92; in 1931, $73¼; in January 1932, $24⅜; in March 1932, $21¼. After Kreuger's death it dropped from $21¼ to ⅜ during the month of April, and in the month of May it sold at a high of ⅜ and a low of ¼. In that month it was struck from the board of the New York Stock Exchange. Thereafter, in the year 1932, this stock was sold "over the counter" at prices ranging from a high of 62½ cents to a low of 12½ cents, but there were sales at auction for prices as low as 1 cent. The highest price realized at any auction sale was 3.61 cents, except for one sale of 25 shares, which brought 24 cents a share. From 1932 to 1935 the highest price at which any of this stock was sold "over the counter" was 27½ cents. In 1936 it sold at prices ranging from 10 cents to 65 cents. In 1937 there were two sales at 5 cents a share.

It will be seen, therefore, that the market fairly accurately reflected the true condition of the financial affairs of this company. A market which dropped from $21¼ to 12½ cents, and in some instances to even less than this, demonstrates almost complete lack of confidence in the value of this

stock. One who paid 12½ cents could have had but a most remote hope of ever realizing anything on the stock. He must have known that his chances were not better than "one in a million."

Section 23 (e) of the Revenue Act of 1936 (49 Stat. 1648, 1659), provides for the deduction from gross income of an individual of "losses sustained during the taxable year and not compensated for by insurance or otherwise." Article 23 (e)-4 of Regulations 94, promulgated under this Act, prohibits a deduction of "shrinkage in value" through fluctuation of the market; but this was not a "shrinkage in value" due to a fluctuation in market. It is not a case of fluctuation in the market, but one where the bottom had dropped out of the market.

The above cited article of Regulations 94 provides for a deduction in the "taxable year in which the stock became worthless, provided a satisfactory showing is made of its worthlessness." In our opinion, where a taxpayer shows that the dominant figure in the corporation in which he owns stock has committed suicide, and that this is followed by the filing of a voluntary petition in bankruptcy by this corporation, and that an examination of the books of the corporation shows that there was carried thereon assets at grossly exaggerated figures, and some that were purely fictitious, and that the liabilities greatly exceeded the assets, and who shows that the market value of the stock dropped from $21¼ immediately prior to the suicide to 12½ cents thereafter, and never thereafter sold for a higher price than 27½ cents, has successfully carried the burden of showing that the stock became worthless in the year in which these things happened. A taxpayer is not required, in order to show worthlessness, to exclude the remote possibility that the stock may have some slight value in the future. As the Supreme Court said, in *United States* v. *White Dental Company*, 274 U. S. 398:

> The taxing Act does not require the taxpayer to be an incorrigible optimist.

It was further said in that opinion:

> The quoted regulations, consistently with the statute, contemplate that a loss may become complete enough

for deduction without the taxpayer establishing that there is no possibility of an eventual recoupment.

Sales of a stock, formerly selling as high as $121⅞, at 10 cents, or even at 65 cents, demonstrate that all hope of recoupment was gone, except in the breast of the "incorrigible optimist," or of a speculator unable to resist odds of 250 to 1.

But the taxpayer says there was some substantial hope of eventual recoupment on account of a certain agreement entered into between the Swedish Match Company and the International Match Corporation in 1924, just before the stock of International was offered for sale. In order to boost the sale of this stock by showing its confidence in it, the Swedish Match Company entered into an agreement with prospective purchasers of International stock, whereby it agreed, among other things, that if the International Match Corporation was unable to pay the stipulated dividends on its stock for two successive years, the Swedish Match Company would reduce its rate of dividends on its own stock to 1⅔ times the average rate of dividends paid by International Match Corporation. The taxpayer says that the protective committee, formed to protect the interests of the preference stockholders, hoped to use this agreement to get something for them. Just how they hoped to do so it is difficult to see unless they intended to make use of its nuisance value. What difference would it make to the holders of the preference stock of International whether or not the Swedish Match Company paid any dividends to its own stockholders? And if the Swedish Match Company violated the agreement and paid its stockholders more than it had promised to pay, how were the stockholders of International Match Corporation injured thereby and, hence, what remedy did they have? It is difficult to see how this agreement added any legitimate value to International's stock.

Now it is true that this protective committee did use this agreement to get an agreement of a sort out of the Swedish Match Company. Under the agreement obtained a corporation known as Imco was formed. With it the Swedish Match Company and the Continental Match Company de-

posited 675,000 shares of Class B stock of the Swedish Match Company, against which Imco was authorized to issue a certificate to every preference shareholder of International Match Corporation who deposited with it two shares of his preference stock. This certificate gave the preference shareholders the right to demand of Imco that one share of the Swedish Match Company should be sold on the London Stock Exchange for every certificate which he held at a price of not less than 20 Swedish kronor. Out of the proceeds of the sale of this stock 20 Swedish kronor were to be paid to the company which had deposited it, and the excess to the certificate holder. (At the time of the making of this agreement the Swedish Match Company's stock was selling at 19 Swedish kronor.)

After the consummation of this agreement there was bid for these certificates various prices ranging from 15 cents to $1.50, and the holders of them were asking prices varying from 30 cents to $2.00. By means of it, therefore, a holder of these preference shares was able to realize on his stock a sum somewhere between 7½ cents and a dollar. After its consummation these preference shares sold from 10 cents to 65 cents. It was an agreement of some, but very little, value. The taxpayer did not think it of enough value to take the trouble to turn in his stock for the certificates.

This agreement with the Swedish Match Company was entered into in 1936. In 1932 a holder of the preference shares of International in determining whether or not his stock was worthless had for consideration only the Swedish Match Company's agreement of 1924 restricting the rate of its dividends. For the reason stated above, we think this added nothing to the value of International stock, and that stock being worthless in 1932, that he had a right to deduct it as a loss in that year. If that right accrued in 1932, it could not be exercised in 1936.

Heretofore three actions have been brought claiming losses on account of the worthlessness of this stock. The first one was *Marsh* v. *Commissioner*, 38 B. T. A. 878. In this case the Board of Tax Appeals held that the stock became worthless in 1932. In *Young* v. *Commissioner*, 123 F. (2d) 597, the Circuit Court of Appeals for the Second Cir-

cuit also held that it became worthless in 1932. In *Clark* v. *Welch*, a jury in the District Court for the District of Massachusetts held that this stock did not become worthless in 1936. An appeal was taken to the Circuit Court of Appeals for the First Circuit on alleged errors in the Judge's charge to the jury. The judgment below was affirmed. *Clark* v. *Welch*, 140 F. (2d) 271.

We are of opinion that the taxpayer in this case has not successfully borne the burden upon him of showing that the stock first became worthless in 1936.

The plaintiff in his excellent brief cites a number of cases involving the worthlessness of the stock of the Middle West Utilities Company. Those decisions are in hopeless conflict. They all depend upon the facts presented in the particular case. Under the facts of this case we are clearly of the opinion that the plaintiff has not borne the burden of showing that the stock became worthless in 1936. His petition, therefore, will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE OSAGE TRIBE OF INDIANS v. THE UNITED STATES

[No. 17763, Congressional. Decided December 4, 1944]

On the Proofs

Indian claims; report to the Senate on claim of Osage Tribe to recover oil royalties paid to Osage county for roads and bridges.—Report to the United States Senate in accordance with Senate Resolution 288, July 1, 1940, and section 257 of Title 28, U. S. Code, holding that the proviso in section 5 of the Act of March 3, 1921, (41 Stat. 1249) was not unconstitutional, and that the Osage Tribe of Indians have no legal nor equitable right to recover from the United States the money paid, pursuant to that section, to Osage county, Oklahoma, for roads and bridges, from royalties on the production of oil and gas in Osage county.

Syllabus

Same; State of Oklahoma unable to tax royalties on oil and gas going to Osage Tribe.—Where under the Act of 1906 (34 Stat. 539) the land owned and occupied by the Osage Tribe, was, exclusive of the mineral rights, allotted to the enrolled members of the tribe; and where the minerals, including oil and gas, were retained in tribal ownership, not subject to allotment, and the tribe was given power, with the approval of the Secretary of the Interior, to make mineral leases, the royalties to go into the common funds of the tribe, which were held by the Government; and where oil and gas leases were made and the royalties paid by the producing companies; the State of Oklahoma was unable to tax the production, either directly or indirectly, since the minerals were under the protection of the Federal Government. *Indian Territory Illuminating Oil Co.* v. *State of Oklahoma*, 240 U. S. 522; *Large Oil Co.* v. *Howard*, 248 U. S. 549.

Same; constitutionality of section 5, Act of March 3, 1921.—Where under section 5 of the Act of March 3, 1921 (41 Stat. 1249) Congress gave to the State of Oklahoma authority to levy and collect a gross production tax on oil and gas produced in Osage County, the Secretary of the Interior to pay out of tribal funds the tax on the tribe's royalty share, which was done; and where, in addition under said section 5 of said 1921 Act, the Secretary was authorized to pay to Osage County, for roads and bridges, one percent of the royalties received by the tribe; it is *held* that the Act of 1921 did not deprive the tribe of its property without due process of law and did not take the tribe's property for public use without just compensation, in violation of the Fifth Amendment.

Same.—The tribe received a special benefit from the expenditures of the money for roads and bridges in Osage County, and it was, therefore, within the constitutional power of Congress to direct that the funds be so spent, for the benefit of the tribe, which at that time owned all the oil and gas in place in the county, and was receiving all the royalties that were being paid.

Same; classification of property for taxation.—A legislature or other taxing body may make a rational classification of property for taxing purposes, without violating the Federal Constitution. *Hart Refineries* v. *Harmon, Treasurer*, 278 U. S. 499.

Same; power of Congress in management of Indian affairs.—The power of Congress, in its management of the funds and property of the Indians, is broad, and the wisdom, or lack of it, in the exercise of the power, will not be reviewed by the courts so long as it is management, and not spoliation, that is involved. *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308, cited. *See also Shoshone Tribe* v. *United States*, 299 U. S. 476, 498.

The Reporter's statement of the case:

Mr. Thomas P. Gore and *Mr. L. C. Garnett* for the plaintiff.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The court made special findings of fact as follows, upon the evidence and a stipulation of the parties:

1. This case is before the Court by reason of a resolution passed by the Senate on July 1, 1940 (Sen. Res. 288, 76th Cong.), referring to the court a bill then pending in the Senate which provides for an appropriation in the sum of $1,975,000 for relief of the Osage Tribe of Indians in Oklahoma. The resolution and the bill are as follows:

RESOLUTION

Resolved, That the bill (S. 2926) entitled "A bill for the relief of the Osage Tribe of Indians in Oklahoma," now pending in the Senate, together with all the accompanying papers, be and the same is hereby, referred to the Court of Claims of the United States, in pursuance of the provisions of section 151 of the Judicial Code (28 U. S. C., sec. 257); and said court shall proceed to investigate and determine the facts and submit such report as may be required or warranted under the provisions of said Act.

BILL

FOR THE RELIEF OF THE OSAGE TRIBE OF INDIANS IN OKLAHOMA

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the sum of $1,975,000, or so much thereof as may be necessary to carry out the purpose of this Act, is hereby appropriated out of any money in the Treasury not otherwise appropriated, to reimburse the Osage Tribe of Indians in Oklahoma and to satisfy the claim, including interest, of said tribe against the United States for all taxes or moneys paid from time to time by the Secretary of the Interior to Osage County, Oklahoma, out of funds belonging to said tribe or the members thereof as provided and directed under section 5 of Public Law Numbered 360, Sixty-sixth Congress (S. 4039, 51 Stat.

1249), said claim being founded on the Constitution and the laws of the United States: *Provided*, That upon approval of this Act said sum shall be placed to the credit of the said tribe on the books of the Treasury Department, where it shall be held in trust for it and shall bear interest at the rate prescribed in existing law and shall be available for expenditure for the benefit of such Indians in the manner heretofore or hereafter provided by law.

2. The Osage Tribe of Indians acquired a tract of land located in what is now the State of Oklahoma consisting of approximately 1,472,000 acres, and comprising what is now Osage County, Oklahoma. Acts of June 5, 1872 (17 Stat. 228), March 3, 1873 (17 Stat. 530), and March 3, 1883 (22 Stat. 603, 624). Thereafter the lands so acquired were occupied by the Osage Indians in common until the lands, not including the minerals, were allotted to the members of the tribe pursuant to the act of June 28, 1906 (34 Stat. 539).

The allotment act of 1906, *supra*, provided, among other things, that the surface of all of the land belonging to the Osage Tribe of Indians in Oklahoma Territory, with the exception of an insignificant amount, should be divided among the members of the tribe; that each member should designate 160 acres of his or her allotment as a homestead, the same to be inalienable and non-taxable until otherwise provided by act of Congress; by a process of selection by the Indians, each Indian was to select 480 acres of land, and the balance of the land to be divided among the Indians by a commission; that the lands of each Indian, other than his homestead, should be inalienable for 25 years and non-taxable for 3 years, except that an adult Indian might, upon petition and proper showing, be granted by the Secretary of the Interior a certificate of competency, in which case his lands, other than his homestead, should become taxable, and alienable by him; and that the oil, gas, coal, and other minerals covered by the lands, allotted or otherwise, be reserved to the tribe for a period of twenty-five years from April 8, 1906. The period of reservation of the minerals has since been extended by subsequent acts of Congress until 1983. Acts of March 3, 1921 (41 Stat. 1249), March 2, 1929 (45 Stat. 1478), and June 24, 1938 (52 Stat. 1034).

Under the allotment act of 1906, and its amendments in 1921, 1929 and 1938, cited above, all allotted lands situated in the Osage Reservation, now Osage County, Oklahoma, were allowed to be leased for oil and gas purposes by the Osage Tribe of Indians through its Tribal Council with the approval of the Secretary of the Interior. Such leases were made and approved from time to time on many parcels of the land and oil and gas in paying quantities were discovered and produced.

3. The act of March 3, 1921 (41 Stat. 1249), amended the Osage allotment act of June 28, 1906 (34 Stat. 539), by extending the period of reservation of the oil, gas, coal, and other minerals covered by the Osage lands until April 7, 1946. In section 5 of that act authority was conferred upon the State of Oklahoma to levy and collect a gross production tax upon all oil and gas produced in Osage County, and the Secretary of the Interior was authorized and directed to pay to Osage County from the amount received by the Osage Tribe as royalties from production of oil and gas the per centum levied by the State as gross production taxes. Section 5 also contained this language:

> *Provided*, That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: *Provided further*, That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only.

Under section 5 of the act of 1921, and the statutes of Oklahoma levying the gross production taxes authorized by section 5, the oil companies producing oil in Osage County have paid the State approximately $15,300,000 in taxes on their share of oil and gas produced in that county, and the Secretary of the Interior has paid the state approximately $3,500,000 on the Indians' royalty share of the oil and gas produced. Pursuant to the Oklahoma statutes, approximately $4,600,000

and $1,000,000 of these respective sums have been paid over by the state to Osage County as the county of origin of the taxes.

During the period from the approval of the act of March 3, 1921, *supra*, to the approval of the joint resolution of April 25, 1940, *infra*, the Secretary of the Interior paid to Osage County, Oklahoma, the sum of $1,092,338.71 on account of the proviso in section 5 of the act of March 3, 1921, directing that the Secretary pay to Osage County a sum equal to one per centum of the amount received by the Osage Tribe as royalties from the production of oil and gas in Osage County. The money so paid was used by Osage County for the construction and maintenance of roads and bridges located in said county.

4. The act of March 3, 1921, *supra*, remained in force and effect until the approval of the joint resolution of April 25, 1940 (54 Stat. 168), which amended section 5 of the 1921 act to read as follows:

> That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross-production tax, not to exceed the existing rate, upon all oil and gas produced in Osage County, Oklahoma, except as herein otherwise provided, and all taxes so collected shall be paid and distributed, and shall be in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma. The gross-production tax on the royalty interests of the Osage Indians shall be at the rate levied by said State but in no event to exceed 5 per centum and said tax shall be paid by the Secretary of the Interior, through the proper officers of the Osage Agency, to the State of Oklahoma from the amount received by the Osage Indians from the production of oil and gas to be distributed in like manner as gross-production tax under the laws of said State and the Secretary shall pay the tax herein authorized upon the condition and not otherwise that an additional one-fifth of said sums paid by the Secretary in pursuance of this Act shall be delivered over to Osage County, Oklahoma, at the same time or times as the other payment or payments herein provided for are made to said county, one-half thereof to be apportioned to a fund to be used by said county only for the construction and maintenance of roads and bridges therein, the other one-

half thereof to be used for the maintenance of common schools of said county as provided by law.

MADDEN, *Judge*, delivered the opinion of the court:

The Senate of the United States has by resolution referred to this court the question of the merits of a claim of the Osage Tribe of Indians. Senate Bill 2926, proposing to appropriate $1,975,000 to pay the claim, was pending in the Senate when the resolution was adopted.

The plaintiff, the Osage Tribe, owned and occupied in common a reservation which now is Osage County, Oklahoma. Pursuant to a statute of 1906, the land, excluding the minerals, was allotted to the enrolled members of the tribe, each receiving about 500 acres, of which 160 acres was to be selected as a homestead, to be non-taxable and inalienable until otherwise provided by Congress. The balance of each Indian's land, called surplus land, was to be non-taxable for three years and inalienable for 25 years unless the Indian was an adult and was, upon petition and investigation, granted a certificate of competency, in which case his surplus land was to be taxable and alienable.

The minerals, including oil and gas, were not made subject to allotment but were retained in Tribal ownership, the Tribe being given power to make mineral leases, with the approval of the Secretary of the Interior, and the royalties to go into the common funds of the Tribe which were held by the Government. Oil and gas leases were made, and royalties were paid by the producing companies. The state was unable to tax the production, either directly or indirectly, because the minerals were under the protection of the Federal Government. *Indian Territory Illuminating Oil Co.* v. *State of Oklahoma*, 240 U. S. 522; *Large Oil Co.* v. *Howard*, 248 U. S. 549.

By section 5 of the act of March 3, 1921, 41 Stat. 1249, Congress gave to the state of Oklahoma authority to levy and collect a gross production tax on oil and gas produced in Osage County, Oklahoma, the oil companies to pay the tax on the companies' share of the production, and the Secretary

of the Interior to pay the tax on the Tribe's royalty share. The state, under this authority, levied such a tax, at 3 per cent until 1935, then at 5 per cent. The state statute provided for the return by the state to the county of origin of a specified proportion of the tax, and Osage County received some $4,500,000 out of a total state tax, on oil and gas produced in the county, of some $19,000,000, from 1921 to 1940.

Section 5 of the act of March 3, 1921, contained, in addition, a proviso that the Secretary of the Interior should pay, in addition to what has been described above, one per cent of the royalties received by the Tribe, to Osage County "which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: * * *" Pursuant to this direction, the Secretary paid, from 1921 to 1940, $1,092,338.17 to Osage County, which used the money for roads and bridges.

The Tribe is seeking the refund by the Government of this amount, with interest. It asserts that the proviso to section 5 of the act of 1921 was unconstitutional in that it deprived the Tribe of its property without due process of law, and took the Tribe's private property for public use without just compensation, both in violation of the Fifth Amendment. The Tribe sees the proviso as nothing more than a donation by the Government of money, which it held in trust for the Tribe, to the county of Osage for a public purpose. The Government urges that the Tribe received a special benefit from the expenditure of the money for roads and bridges in the county, and that it was, therefore, within the constitutional power of Congress to direct that the funds be so spent.

We think that the proviso was not unconstitutional. When it was adopted, the Tribe owned all the oil and gas in place in the county, and was receiving all the royalties that were being paid. The minerals constituted, no doubt, a large proportion of the taxable wealth of the county. If Congress had authorized the county to lay a road and bridge tax of one per cent on oil royalties in the county, that would have been a constitutional tax, though, because of communal ownership, there would have been only one taxpayer, the Tribe. A leg-

islature or a taxing body may make a rational classification of property for taxing purposes, without violating the Federal Constitution. *Hart Refineries* v. *Harmon, Treasurer*, 278 U. S. 499. The express direction in the proviso to section 5 that the Secretary of the Interior pay to the county what Congress could have validly authorized the county to collect in taxes was not, in substance, different from an authorization to levy a tax, though it was not, technically, a tax. The payment would hardly be unconstitutional if a tax having the same financial consequences would not have been.

In addition to what has been said, we think that there is merit in the Government's contention that the Tribe received a special benefit from the expenditure of its funds. In 1921 when the proviso in question was adopted, the Tribe owned all the minerals in the county, and, as the law has now been amended, will continue to own them until 1983. The construction and maintenance of roads and bridges would increase the value of the minerals. The plaintiff urges that most of the land had been leased for oil and gas before 1921; the bonuses had been agreed on and paid, and the royalties fixed, so that the benefits from improved highways went to the oil company lessees rather than to the Tribe. To what extent this is true, we do not know, but to whatever extent the land had not been leased in 1921, and to whatever extent additional production on existing leases has taken place or will take place because the properties are more accessible by reason of improved highways, the Tribe has received a benefit. Furthermore, in 1906 the Tribe owned all the land in the county. Under the Allotment Act of 1906, the land, not including the minerals, was allotted to the individual members of the Tribe. Each Indian's homestead, which comprised about one-third of his land, was made permanently inalienable and non-taxable, until Congress should otherwise direct. Here then, was about one-third of the land in the county, and the best third, which could contribute nothing to local improvements. The surplus, or non-homestead lands, allotted to individual Indians, were non-taxable for three years, and inalienable for twenty-five years, except for the

probably unusual cases of adult Indian owners who had petitioned for, and after investigation, had been given certificates of competency. In 1921, then, most of the lands of the county were probably still owned by the Indians, who were the same persons who, as a Tribe, owned the oil and gas royalties. The benefits of more convenient use and of increases in value of the land in the county, which would result from improved highways, would, then, go principally to the Indians, the persons who, as a Tribe, owned the royalties. If money was to be raised for roads and bridges, it would seem that taxes on the lands of the Indians, or a contribution from their royalties in the Tribal fund, would have been the two most promising sources. But a road tax on the lands in the county would have, in reality, been paid by the same people, largely, whose money was used to make the payment here complained of.

The power of Congress, in its management of the funds and property of the Indians, is broad, and the wisdom, or lack of it, will not be reviewed by the courts, so long as it is management, and not spoliation, that is involved. *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308. Compare *Shoshone Tribe* v. *United States*, 299 U. S. 476, 498.

Our conclusion is that the proviso in section 5 of the act of March 3, 1921, 41 Stat. 1249, was not unconstitutional, and that the Osage Tribe of Indians have no legal or equitable right to recover from the United States the money paid to Osage County, Oklahoma, pursuant to that proviso.

It is ordered that the special findings of fact herein and the foregoing opinion of the court be certified to the Senate of the United States in accordance with Senate Resolution 288, July 1, 1940, and section 151 of the Judicial Code (United States Code, title 28, sec. 257).

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

MENOMINEE TRIBE OF INDIANS v. THE UNITED STATES

[No. 44296. Decided March 5, 1945]*

On Defendant's Motion For New Trial

Indian claims; loss of interest on fund held by Government as fiduciary.—Where plaintiff tribe had on deposit with the United States Treasury a fund known as the "Menominee Log Fund", upon which the Government had agreed to pay interest at 5 percent, and from which fund withdrawals were made, in accordance with law; and where when reimbursement was first made the sum repaid was deposited in what was known as the "Menominee 4% Fund"; and where later all withdrawals from the 5 percent fund were restored except for $152,704.88, on which interest was credited at 4 percent instead of 5 percent; it is *held* that plaintiff is entitled to recover the difference of 1 percent from the close of the fiscal year ending in 1917 to date of final judgment.

Same; Acts of 1906 and 1908 authorizing withdrawals construed together.—The Acts of June 28, 1906 (34 Stat. 547) and March 28, 1908 (35 Stat. 51), both relating to the cutting and sale of timber belonging to the plaintiff tribe, are *in pari materia* and should be construed together.

Same; the Government as fiduciary.—The Government stood in a fiduciary relationship to the plaintiff tribe (*Seminole Nation* v. *United States*, 316 U. S. 286, 297) and the Jurisdictional Act (49 Stat. 1085) requires the Court to apply "as respects the United States the same principles of law as would be applied to an ordinary fiduciary."

Same.—The Government acting as a fiduciary cannot profit at expense of its ward by withdrawing amounts from funds on which it was obligated to pay 5% interest and restoring these amounts to fund on which it was obligated to pay only 4% interest.

Same; net proceeds defined.—Where the Act of 1908 authorized the deposit in the 4% fund of the "net proceeds" only, it is *held* that "net proceeds" are what is left after deducting the expenses of operations, which includes depreciation on the capital assets employed in earning the income.

Same.—Following the decision in *Menominee Tribe of Indians* v. *United States*, 97 C. Cls. 158, 161, it is *held* that the Act of February 12, 1929 (45 Stat. 1164) has no application to a fund representing interest which had accrued on other funds, and plaintiff is not entitled to recover on this part of its claim, for interest on interest.

*Argued October 12, 1943.

Reporter's Statement of the Case

Same; motion for general accounting; amendment of petition; statute of limitation.—Where in its original petition filed on December 1, 1938, plaintiff complained of withdrawals from the "Menominee Log Fund" for operations under the Act of 1908 only, without any mention of withdrawals under the Act of 1906; and where, on the same date, plaintiff filed a bill for general accounting, in response to which the Comptroller General's report showed withdrawals under the 1906 Act, later supplemented by the 1908 Act; plaintiff's motion, which was properly granted, for leave to amend its petition by consolidating with said petition the petition for general accounting, was timely.

Same; accounting by fiduciary.—In a petition by the "ward" for a general accounting by its "guardian"; it is not necessary to point to any specific wrongful act of the guardian.

The Reporter's statement of the case:

Mr. Andrew E. Stewart for the plaintiff. *Messrs. Richard E. Dwight, Ernest L. Wilkinson, John W. Cragun*, and *Dwight, Harris, Koegel & Caskey* were on the briefs.

Mr. Benjamin F. Pollack, with whom was *Mr. Assistant Attorney General Norman N. Littell*, for the defendant. *Messrs. Raymond T. Nagle* and *Walter C. Shoup* were on the briefs.

Defendant's motion for a new trial is granted. The former opinion, conclusion of law, and special findings of fact [October 2, 1944] are withdrawn, and the following are substituted therefor.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The Act of September 3, 1935 (49 Stat. 1085), confers jurisdiction on this court "to hear, determine, adjudicate, and render final judgment on all legal or equitable claims of whatsoever nature which the Menominee Tribe of Indians may have against the United States, arising under or growing out of any treaties, agreements, or laws of Congress, or out of any maladministration or wrongful handling of any of the funds, land, timber, or other property or business enterprises belonging to said tribe or held in trust for it by the United States, or otherwise * * *."

This Act was amended on April 8, 1938 (52 Stat. 208), to permit the filing of separate suits on plaintiff's various claims against the defendant.

2. Pursuant to the Act of June 12, 1890 (26 Stat. 146), certain members of the plaintiff tribe were employed by the Secretary of the Interior to cut and bank timber on plaintiff's reservation. After the logs were sold, one-fifth of the proceeds was deposited in a non-interest-bearing fund in the Treasury of the United States for the benefit of the Indian tribe, and four-fifths was deposited in a fund bearing interest at 5 percent per annum, all in accordance with section 3 of the Act of June 12, 1890. The fund bearing 5 percent interest was denominated "Menominee Log Fund" and the non-interest-bearing fund as "Fulfilling Treaties with Menominees, Logs."

3. A cyclone in July 1905 blew down a considerable quantity of timber on plaintiff's reservation. Following this, Congress, by the Act of June 28, 1906 (34 Stat. 547), authorized the cutting, manufacture, and sale of the dead and down timber, in addition to the timber authorized to be cut and sold under the Act of June 12, 1890, *supra*. Contracts for logging this timber were entered into under the authority granted by the Act of June 28, 1906, the expenses of which were paid from plaintiff's trust funds in defendant's hands in the total amount of $280,358.92. Of this amount $241,385.69 was expended from the "Menominee Log Fund."

4. The Act of 1906 directed that contracts for the sawing of the logs into lumber be entered into with private owners of portable mills. It was, however, found impossible to find satisfactory portable-mill owners who were willing to enter into such contracts at the price fixed in the Act. Consequently, in order to saw these logs into timber, as well as all other logs cut on the reservation, Congress passed the Act of March 28, 1908 (35 Stat. 51), authorizing the Secretary of the Interior to cause to be built and equipped a sawmill and other improvements on the reservation necessary for the logging of the timber and the sawing of the same into lumber. The mill built under this authority was known as the "Menominee Indian Mills." At this mill was sawed the logs cut under the Act of 1906 as well as all other logs thereafter cut on the reservation.

5. Receipts and disbursements under the Acts of 1906 and 1908 were carried on the books of the Department of the Interior under an account known as "'Menominee Indian

Mills." In addition to the $241,385.69 withdrawn from the Menominee Log Fund under the provision of the Act of 1906, there was withdrawn from this fund to carry on operations under the 1908 Act up to and including the close of the year 1917 a total amount of $3,216,574.45, and there was also withdrawn from this fund $125,405.16 to restore the amount withdrawn from the non-interest-bearing fund, "Interest on Menominee Log Fund." This made a total amount of $3,583,365.30 that was withdrawn from the Menominee Log Fund for operations under the Acts of 1906 and 1908. The amount of $3,216,574.45 withdrawn from the Menominee Log Fund for operations under the 1908 Act includes the amount spent for the erection of the sawmill, and for the purchase of logging and mill equipment, and for other permanent improvements incident to the timber operations authorized by the Act of 1908.

6. From the beginning of operations under the Act of 1906 to the close of the fiscal year 1912 the proceeds from the sale of lumber manufactured from logs cut under the authority of the Acts of 1906 and 1908 were deposited in a fund known as the "Menominee 4% Fund," on which the defendant paid interest at 4 percent. No segregation was made of receipts from the sale of lumber sawed from logs cut under the Act of 1906 from those cut under the Act of 1908.

7. At the close of the fiscal year 1912 there was a balance of $1,079,079.40 in this "Menominee 4% Fund." During this year the Secretary of the Interior had requested an opinion of the Comptroller of the Treasury as to the propriety of withdrawing funds for expenses under the Acts of 1906 and 1908 from the "Menominee Log Fund" bearing interest at 5 percent per annum and the deposit of receipts from operations under these Acts in the "Menominee 4% Fund." On June 18, 1912, the Comptroller of the Treasury rendered an opinion holding that receipts from the operations under these Acts should have been first used to reimburse the "Menominee Log Fund," and that only the balance remaining should have been deposited in the "Menominee 4% Fund." In accordance with this opinion, the Secretary of the Interior transferred $79,623.89 to the non-interest-bearing account, "Fulfilling Treaties with Menominees, Logs," which fully re-

stored the amount withdrawn from this fund, and he transferred to the "Menominee Log Fund" the balance of $999,455.51 remaining in the "Menominee 4% Fund."

8. Thereafter, and through the fiscal year 1917, all expenses were paid out of the "Menominee Log Fund," and there was deposited in that fund all receipts from the sale of lumber. For the years 1913 to 1917 these receipts totalled $2,431,204.91. The total amount restored to the "Menominee Log Fund" is thus $3,430,660.42. There has not been restored to that fund $152,704.88 withdrawn for operations under the Acts of 1906 and 1908. At the close of the fiscal year 1917 there had been received from the sale of lumber manufactured under the Act of 1908 an amount sufficient to have restored the "Menominee Log Fund" in full.

The court decided that the plaintiff was entitled to recover 1 percent interest on $152,704.88 from the close of the fiscal year ending in 1917 to the date of final judgment in this case.

The court reserved for further proceedings under rule 39 (a) the determination of the exact amount of the recovery and of the offsets, if any.

WHITAKER, *Judge*, delivered the opinion of the court:

This is one of several suits brought by plaintiff growing out of the defendant's administration of its affairs. This one involves interest on the "Menominee Log Fund." The plaintiff had on deposit in the Treasury of the United States a fund known as the "Menominee Log Fund," upon which defendant had agreed to pay interest at 5 percent. Withdrawals were made from this fund, but when reimbursement was first made the sum repaid was deposited in what is known as the "Menominee 4% Fund." Later all withdrawals from the 5 percent fund were restored, except for $152,704.88. Interest on this amount has been credited to the Indian tribes at 4 percent instead of at 5 percent. The plaintiff sues for the difference of 1 percent, plus interest on this interest.

On June 12, 1890, Congress passed an Act (26 Stat. 146) authorizing the cutting of a certain portion of the timber on the Indian reservation and for the sale thereof. One-

fifth of the "net proceeds of sales" was to be used for the benefit of the Indians under the direction of the Secretary of the Interior, and the residue was to be deposited in the Treasury of the United States at 5 percent interest, the interest to be paid to the tribe per capita, or expended for their benefit under the direction of the Secretary of the Interior.

In 1905 a cyclone blew down a lot of the timber on plaintiff's reservation. On June 28, 1906 (34 Stat. 547), Congress authorized this timber to be cut into logs by the Indians and authorized the Secretary of the Interior to make contracts with portable-mill owners to come upon the reservation and saw the logs into lumber. Such mill owners were to be paid a sum not in excess of $3.50 per thousand feet board measure. The expenses of cutting the logs and sawing them into lumber were to be paid out of the funds of the tribe on deposit in the Treasury, the sums withdrawn to "be reimbursed from the sale of the lumber as herein provided." It was further provided that "from the proceeds of the sales of such lumber there shall be deposited in the Treasury of the United States to the credit of the said Menominee tribe of Indians the amount of money paid out of said fund as the expense of cutting, sawing, piling, and grading said lumber." One-fifth of the "net proceeds" were to be used for the benefit of the Indians under the direction of the Secretary of the Interior, and the balance was to be deposited in the Treasury of the United States at 4 percent interest.

It was found impossible to induce satisfactory mill owners to enter into contracts to saw the logs into lumber at the price fixed in the Act, and so on March 28, 1908, Congress passed an Act (35 Stat. 51) authorizing the Secretary of the Interior "to cause to be cut and manufactured into lumber the dead and down timber, and such fully matured and ripened green timber as the forestry service shall designate." To this end the Secretary was authorized to build suitable sawmills and buildings and to construct necessary roads and make necessary improvements in streams. The lumber manufactured from the timber was required to be sold to the highest and best bidder for cash, and it was provided that "the net proceeds of the sale of such lumber and other material shall be deposited in the Treasury of the United States to the credit of the tribe entitled to the same. Such proceeds

shall bear interest at the rate of four per centum per annum * * *."

All expenses incurred under the Act of 1906 were paid out of the "Menominee Log Fund" and two non-interest-bearing funds denominated "Interest on Menominee Log Fund" and "Fulfilling Treaties with Menominees, Logs." Likewise, after the passage of the Act of March 28, 1908, the expenses of the erection of sawmills and buildings and for the construction of roads and improvement of streams and for the operation of the sawmills and other expenses were paid out of these funds. After the timber was sold the gross proceeds of the sales were not deposited in the funds from which they had been withdrawn, but in a fund known as the "Menominee 4% Fund."

The propriety of making withdrawals from a fund bearing interest at 5 percent and making repayments to a fund bearing interest at 4 percent was questioned, and the matter was referred to the Comptroller of the Treasury, who rendered an opinion holding this illegal. Thereupon, the Secretary of the Interior in 1912 transferred $79,623.89 of the 4 percent fund to restore the fund for "Fulfilling Treaties with Menominees, Logs," and the balance of $999,455.51 was restored to the "Menominee Log Fund." Thereafter, further withdrawals were made from the "Menominee Log Fund," but all subsequent receipts were deposited in that fund. The total amount withdrawn from it from the beginning of operations under the 1906 Act through 1917 was $3,583,365.30. The total amount restored to this fund was $3,430,660.42, a deficit of $152,704.88. The 4 percent fund was sufficient at the close of the year 1917 to have restored this deficit.

The defendant filed an answer and counterclaim in which it alleged that no amount should have been transferred from the 4 percent fund to the 5 percent fund and that it was improper to have deposited receipts in the 5 percent fund, but that the excess of receipts over operating expenses should have been deposited in the 4 percent fund.

It does not seem to us to be open to question that it was improper to have made withdrawals from the 5 percent fund and to have made reimbursement to a fund bearing a lesser rate of interest.

The Acts of 1906 and 1908 are *in pari materia* and should

be construed together. The Act of 1908 was supplementary to the Act of 1906. It was passed because the provisions of the 1906 Act for the making of contracts with private mill owners for the sawing of the logs into lumber had proven impracticable. The Act of 1906, authorizing withdrawals from the 5 percent and other funds, expressly required their repayment to these funds, and for the deposit in the 4 percent fund only of the "net proceeds," to wit, the amount left after reimbursement of the withdrawals had been made. The Act of 1908 provided for deposits in the 4 percent fund only of the "net proceeds" of the sale of timber; it did not provide for the deposit in this fund of the gross proceeds. It is clearly implied from it that any sums withdrawn from any fund for operations under the Act should be restored to that fund, and only the balance left, to wit, the "net proceeds," should be deposited in the 4 percent fund. The Act of 1908 standing alone should be so construed, but read in connection with the Act of 1906 the construction seems inescapable.

Moreover, it must be remembered that the defendant stood in a fiduciary relationship to the plaintiff (*Seminole Nation v. United States*, 316 U. S. 286, 297), and that the jurisdictional Act requires us to apply "as respects the United States the same principles of law as would be applied to an ordinary fiduciary." The defendant, the fiduciary, had in its treasury the plaintiff's money, upon which it was obligated to pay 5 percent interest. When it withdrew money from this fund to carry on a business for the plaintiff it was, of course, prohibited from making restorations of the amount withdrawn to a fund bearing a lesser rate of interest. By doing so it profited by paying plaintiff 1 percent less interest than it was obligated to pay. This is violative not only of the provisions of the Acts of 1906 and 1908, but also of its fiduciary obligations.

The defendant in its brief does not undertake to defend the position taken in its answer and counterclaim; it concedes that the expenses of operations should have been repaid to the 5 percent fund; but it does say that the Act of 1908 did not require the defendant to restore to that fund such part of the withdrawals from it as were required for the making of the

permanent improvements, such as the erection of the mill and buildings, the building of roads, and improvement of streams. It says that only the withdrawals for operating expenses were required to be restored. However this may be, it was, of course, obligatory on the defendant to set aside a reserve for depreciation to replace the capital assets that would eventually be worn out from use. The accretions to this reserve, at least, should have been deposited in the account from which the money was withdrawn to make the capital investment. The Act authorizes the deposit in the 4 percent fund of only the "net proceeds." The "net proceeds" are what is left after deducting the expenses of operations, which includes depreciation on the capital assets employed in earning the income. The sawmill was built back in 1909—35 years ago. Reasonable depreciation upon it and upon the other improvements made would by this time equal the original capital investment. The total amount withdrawn from the fund for the capital investments made should have been restored, at least by this time.

So much, as least, is required by the Acts of 1906 and 1908; but defendant stood in a fiduciary relationship to plaintiff, and as a fiduciary it was under the obligation to use funds in its hands in the way most beneficial to plaintiff. It was prohibited from using them for its own benefit. This required it to make restitution of the amounts withdrawn from the 5 percent fund, instead of borrowing these amounts from plaintiff at a lesser rate of interest.

It is conceded that funds were available at the end of 1917 to have reimbursed the fund in full. It follows the plaintiff has been deprived of 1 percent interest on the deficit of $152,704.88 since that time.

Plaintiff in its petition says that under the Act of February 12, 1929 (45 Stat. 1164), it is entitled to 4 percent interest on the deficit of 1 percent interest that should have been paid on the amount of $152,704.88. In *Menominee Tribe of Indians* v. *United States*, 97 C. Cls. 158, 161, we held that the Act of 1929 had no application to a fund representing interest which had accrued on other funds. Plaintiff in its requested findings of fact does not now ask for interest

on this interest. Under the authority of the above-mentioned case, we hold that plaintiff is not entitled to recover on this part of its claim.

The defendant devotes a large part of its brief to a defense not raised in its answer and counterclaim, to wit, that it was not until after the statute of limitations had run that the plaintiff made claim that the 5 percent fund should have been reimbursed for expenses incurred under the Act of 1906.

Congress on September 3, 1935, passed an Act (49 Stat. 1085) authorizing plaintiff to bring suit for the amounts it claimed were due it by defendant. A petition was filed pursuant to this Act on September 2, 1937, in which plaintiff plead all the claims it thought it had against the defendant.

Following this, Congress on April 8, 1938, passed an Act (52 Stat. 208) authorizing the filing of separate petitions covering each of plaintiff's claims. On December 1, 1938, thirteen petitions were filed. One of them was for loss of interest on the "Menominee Log Fund." This complained only of withdrawals from this fund for operations under the Act of 1908 and did not mention withdrawals under the Act of 1906. However, on the same date plaintiff filed a bill for a general accounting by defendant. Then, when the Comptroller General's report showed withdrawals from the 5 percent fund for operations under the 1906 Act, later supplemented by the 1908 Act, plaintiff filed a motion for leave to amend its petition for loss of interest on the Menominee Log Fund by consolidating with it its petition for a general accounting, insofar as withdrawals from this Menominee Log Fund were concerned. This motion was granted. It was properly granted because plaintiff had filed within time a petition giving it the right to recover the interest on any withdrawals from this fund that had not been repaid, to wit, the petition for a general accounting. In that suit it was not necessary for plaintiff to point to any specific wrongful act of the defendant; it was a petition by the "ward" for a general accounting by its "guardian."

This defense is not well taken.

Plaintiff is entitled to recover 1 percent interest on $152,704.88 from the close of the fiscal year ending in 1917 until final judgment in this case.

The court reserves for further proceedings under rule 39 (a) of this court the determination of the exact amount of the recovery and of the offsets, if any. It is so ordered.

MADDEN, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE SEMINOLE NATION v. THE UNITED STATES

[Nos. L-51 and L-208. Decided December 4, 1944. Plaintiff's motion for new trial overruled March 5, 1945]

On the Proofs

(No. L-51)

Indian claims; findings of fact upon remand by the Supreme Court as to corruption, venality and failure to comply with fiduciary obligation in disbursement of tribal funds.—Upon remand by the Supreme Court, it is *held* that as to payments made from 1870 to 1874 directly to the tribal treasurer of the Seminole Nation and to designated creditors of the Nation, pursuant to requests of the Seminole General Council, it is not established by the evidence adduced that the General Council, during the years in question, was corrupt, venal and false to its trust, and it is not established that such venality and corruption were known to the administrative officers of the Government charged with the disbursement of Indian moneys. (Item No. 2, a claim based upon the defendant's obligation under Article VIII of the Treaty of 1856 to pay to the tribe annually $25,000 to be distributed per capita. 93 C. Cls. 500, 518; 316 U. S. 286).

Same.—As to fraud and corruption during the period from 1870 to 1874, the only evidence before the Commissioner of Indian Affairs at the time he authorized the payments to the tribal treasurer during this period, as requested by the General Council of the tribe, were the reports of the Indian Agent, the information contained in which was not sufficient to justify the conclusion that the Commissioner had knowledge of the fact that the General Council was corrupt, venal and false to its trust.

Same; payments made during period between 1899 to 1907; corruption and venality not established.—Upon remand by the Supreme Court, it is *held* that as to payments made to the tribal treasurer during the years 1899 to 1907, it is not established by the evidence adduced that the General Council, during the

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years in question, was corrupt, venal and false to its trust, nor that such venality and corruption were then known to the disbursing officer of the Government. (Item No. 5, a claim for all moneys paid to the trial treasurer after the passage of the Curtis Act of June 28, 1898. 93 C. Cls. 500, 521; 316 U. S. 286).

Same; pleading; mere allegation of illegality not sufficient allegation of fraud.—A disbursement to officials of the tribe who were known to be corrupt, venal and false to their trust would be an "illegal" disbursement but the mere allegation in plaintiff's petition that the sums were "illegally disbursed," without any statement of facts to support the charge of illegality, is an insufficient allegation of fraud because it complies with neither Section 159 of the Judicial Code nor with Rule 10 of the Court of Claims. *Merritt* v. *United States*, 267 U. S. 338, 341, cited.

Same.—Where plaintiff in its original petition in the instant case made no claim based on the illegality of the disbursements involved in Item 2; and where no amended petition was filed within the time permitted by the Special Jurisdictional Act, setting up this ground of recovery, there is grave doubt that the Court of Claims has jurisdiction to consider the question of illegality on the ground of corruption but the court does not pass on the question of jurisdiction since the plaintiff is not entitled to recover on the merits.

Same.—Where, as to Item 5, plaintiff in its petition based its right to recover on the violation of Section 19 of the Curtis Act; but where, nevertheless, plaintiff did allege that as to the years 1899 to 1907 the tribal officials were corrupt and introduced proof to support this allegation; it is *held* that the court has jurisdiction to pass upon the question of corruption, a petition setting up the facts having been filed within the time fixed by the Jurisdictional Act.

Same; the Government's obligation as a fiduciary under Indian treaties and agreements.—In the treaties and agreements with the Indian tribes, and the Acts of Congress relating thereto, there is implied on the part of the United States an obligation to carry out their terms with the fidelity a fiduciary owes to its ward. *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, and *Creek Nation* v. *United States*, 318 U. S. 629, distinguished; *Menominee Tribe* v. *United States*, 101 C. Cls. 22, cited.

(No. L–208)

Same; date of taking determined.—Where another tribe was settled on a part of plaintiff's lands due to an erroneous survey and these lands were later allotted to them and patented to white settlers, following the decisions in *Creek Nation* v. *United States*, 295 U. S. 103 and 302 U. S. 620 (F–205), it is *held*

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that the defendant took plaintiff's lands on the dates the defendant allotted them to the Pottawatomies in severalty in 1892 and from the dates of the patents to white settlers, from 1895 to 1913. *Shoshone Trie* v. *United States*, 299 U. S. 476, distinguished.

Same; value of lands taken determined.—The valuation of $7.00 per acre for all the lands so taken, 10,351.82 acres, is held to be fair and equitable, from all the testimony produced, and the plaintiff is entitled to recover this amount, $72,462.74, plus interest at 4 percent per annum, from 1899, by which time about one-half of the acreage had been allotted or patented, to date of judgment, or $130,215.54; a total of $202,678.28.

Gratuities

Indian claims; former finding in No. L–51 is reaffirmed as to subsistence item.—Where by the Act of July 27, 1868 (15 Stat. 199, 214), Congress appropriated $31,083.79 for subsisting the Seminole Indians and provided that this amount should be deducted from any funds belonging to them; and where on the former trial of No. L–51, the plaintiff admitted that the defendant was entitled to this offset, which was thereupon allowed by the court (93 C. Cls. 525), this finding is reaffirmed.

Same; purchase of 175,000 acres additional for Seminole Nation was a gratuity.—Where Congress, in the Act of March 3, 1873 (17 Stat. 626)), authorized the purchase at $1 per acre of an additional 175,000 acres of land from the Creeks, which were conveyed to the Seminole Nation, this was not the discharge of any legal obligation incurred but was merely the gratuitous correction of an unfortunate error that had been made, and under the provisions of the Act of March 12, 1935 (49 Stat. 571, 596), is to be offset against any amount due to the Seminole Nation. (93 C. Cls. 526).

Same; limitation on authority of Government official.—No officer of the Government has the power to bind the United States, in the absence of Congressional authority to do so. Cf. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 494; *United States* v. *North American Co.*, 253 U. S. 330, 333.

Same; expenses of Indian agencies not gratuities.—Where an Indian agency was maintained for the purpose of carrying out the provisions of treaties with the Indians, the expenses of such agency are not gratuities. *Blackfeet et al.* v. *United States*, 81 C. Cls. 101, 137, and 138, and *Shoshone Tribe* v. *United States*, 82 C. Cls. 23, 93, 94, distinguished.

Same; former holding revoked as to agency expenses.—Upon review by the court, the holding that agency expenses are allowable as gratuities (93 C. Cls. 529) is held to be in error.

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Same; expenses of Dawes Commission and of subsequent surveys and allotments were not gratuities.—The expenses of the Dawes Commission appointed under the Act of March 3, 1893 (27 Stat. 645), for the purpose of securing agreements from the Indian Tribes permitting the allotment of the tribal lands in severalty and the survey and allotment of such lands under the Seminole Agreement (30 Stat. 567) and the Supplemental Seminole Agreement (31 Stat. 250) were expenses incurred by the defendant in the performance of a duty which the defendant had agreed to perform and cannot be regarded as gratuities.

Same; Choctaw case now distinguished; former holding in L–51 reversed.—In the former opinion in No. L–51, the allotment expenses of the Dawes Commission were allowed as gratuities (93 C. Cls. 532) on the authority of *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 366, 371; the Choctaw case is now distinguished on the ground that the agreement under construction in the *Choctaw* case had specifically provided that the United States should bear certain expenses incident to the breaking up of tribal ownership and that the claim there asserted by the plaintiff (Choctaw Nation) was to recover other expenses charged to it which had not been assumed by the United States (91 C. Cls. 371), whereas in the instant case the agreement was altogether silent as to who should bear any part of the expenses; these expenses are now disallowed as gratuities.

Same; burden on defendant to show that expenditures were gratuities.—It is for the defendant to show by proof that expenditures made in connection with the change from tribal to individual ownership were gratuities, which has not been done in the instant case.

Same; office expenses disallowed as gratuities in absence of proof.—Where it is admitted by the defendant that a part of the item of $135,219.60 for office expenses (finding 38) was incurred by the Dawes Commission in negotiating agreements with the Indian tribes and that so much of this item should not be charged as a gratuity; and where there is no satisfactory proof to show how much, if any, of the item should be charged as a gratuity, the entire item must be disallowed. (See 93 C. Cls. 513, 533.)

Same; former findings and opinion reaffirmed with specific exceptions.—Except for the items specifically referred to in the court's opinion, the former findings and opinion with reference to the expenditures listed in findings 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the former opinion (93 C. Cls. 500) as modified by findings 32, 33, 34, 35, 37, 38 and 39 of the instant opinion, are adopted and reaffirmed.

Same; gratuities exceed amount of recovery to which plaintiff is entitled.—It is *held* that the defendant is entitled to offset against the amount due plaintiff, which is $221,066.28, items aggregating $221,569.20; and since the amounts held to have been spent by the defendant gratuitously for plaintiff's benefit exceed the amount plaintiff is entitled to recover, plaintiff's petitions are dismissed.

The Reporter's statement of the case:

Mr. Paul M. Niebell for the plaintiff. *Messrs. W. W. Pryor* and *C. Maurice Weidemeyer* were on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The court made special findings of fact as follows:

1. Under Article 8 of the Treaty of August 7, 1856 (11 Stat. 699, 702), between the United States and the Creek and Seminole Nations of Indians, as a part of the consideration to be paid to the Seminole Nation, the United States agreed to establish a trust fund of $500,000 for the Seminole Nation, and to invest the same at 5 per centum per annum, "the interest of which at the rate aforesaid, shall be annually paid over to them per capita as an annuity."

2. After the passage of the Act of July 26, 1866 (14 Stat. 255, 263, 264), Congress annually appropriated for each fiscal year from 1867 to 1909, both inclusive, the sum of $25,000 as provided for in the above article.

3. During the years 1870 to 1874 the United States through its appropriate disbursing officer paid the following amounts, due to have been paid per capita, to the tribal treasurer pursuant to resolutions of the Seminole General Council asking that said sums be so paid:

Year:	*Amount*	
1870	$17,821.00	(a)
1871	12,500.00	(b)
1872	12,500.00	(b)
1873	12,500.00	(b)
1874	11,101.64	(c)
	66,422.64	

The disbursement of the above sums is explained in finding 5 (a), (b), and (c).

4. Captain T. A. Baldwin, U. S. Army, was Indian Agent from sometime in the middle of the year 1869 to the latter part of 1871. He was succeeded by Henry Breiner, who continued in said office through 1874.

5. The payments of the sums totaling $66,422.64, referred to in finding 3, were made under the following circumstances:

(a) February 8, 1870, the Commissioner of Indian Affairs advised the Indian agent as follows:

> In regard to the manner of paying the funds to the Seminoles, I would say that in case the Indians in council direct you to pay any claims against the tribe that may be presented to you, you are authorized to do so, but not otherwise. Any payment made by you under such authority, must be supported by a duly certified copy of the proceedings of the council, the same to be attached to the vouchers taken for the money. The residue of the item of $12,500.25 per tabular statement, after paying such claims, will be paid per capita in the usual manner, and in accordance with instructions contained in office letter of September 3, 1869. The other items in the tabular statement will be used for the object therein named.

April 8, 1870, the Seminole General Council passed an act providing in part as follows:

> That Capt. T. A. Baldwin, U. S. Agent, be and he is hereby authorized to pay the amount of Seventeen Thousand Eight Hundred and Twenty-one Dollars ($17,821) to the following individuals out of any money now paid in his hands for our Nation as annuity &c. after the manner and in the sums hereinafter prescribed. [Here followed a list of creditors of the Seminole Nation with annuities due each.]

Said payments were made to the parties and in the amounts as designated in said act of the Seminole General Council.

May 1, 1870, Captain Baldwin, Indian Agent, transmitted to the Commissioner of Indian Affairs an abstract of the disbursement of $17,821 made by him pursuant to the act of the Seminole General Council. The disbursements were as follows:

Chiefs and lawmakers	$12,414.50	
Drafts paid	2,406.50	
Trust funds paid to John Brown	3,000.00	
		[1] $17,821.00

[1] See Item (a), finding 3.

He also reported the following disbursements:

Support of government	$500.00	
Wood for school	24.00	
Paid to Indians per capita	7,179.25	
		$7,703.25
		25,524.25

With reference to the payments to the tribal officers, Captain Baldwin wrote the Commissioner of Indian Affairs on the dates stated as follows:

On November 3, 1869, he wrote as follows:

> I have the honor to state that after making the payment of annuities to the Seminole Indians per "capita" as ordered, I asked the chiefs and warriors how they wished the next payment made.
>
> They replied that they wished it paid over to the chiefs to enable them to pay the national debt which has been accruing some time.
>
> I would respectfully recommend that the next annuities be ordered paid as requested, as the amount appropriated for the support of the Seminole Govt. is not adequate.

On December 6, 1869, Captain Baldwin wrote as follows:

> I have the honor to state that during the month of October, I recommended that when the next payment was made to the Seminole Nation, that the whole amount be turned over to the Chiefs of the nation, to enable them to pay off their national debt, and not paid upon rolls "per capita".
>
> I then supposed that the amount would be the usual payment made, $12,500.00. I would now recommend that if the amount now due and the amount which will be due for the 1st and 2nd quarters, 1870, be paid at the same time, that I be ordered to turn over to the Chiefs, and take their receipts for same, whatever amount the department may designate, to enable them to liquidate the national debt, which from all the information I am able to gain is about $6,000.00 that has accrued against the nation for Councils, and the salaries of its officials. The balance to be paid out per "Capita" upon rolls.
>
> There is still another debt against the nation. Claimants John Chup-co, Fus Har-jo, and Chi-Cot-har-jo, Chiefs of the nation amounting to $9,000.00 it was formerly $18,000.00, or $6,000.00 each but a portion of it

has been from time to time paid, leaving the balance above named. This $18,000 was to be paid them for making and signing the treaty made with the United States in 1865.

I would state that they are in the habit of calling Councils, for any little thing that may arise and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation, except in spending the funds; which are taken out of those ordered paid per "capita" to the nation.

I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making returns to the department, upon rolls as if it had been paid per "Capita".

I think that it is an injustice to the majority of the people comprising this nation and the only way to avoid unnecessary expenditure of money for Councils, &c. which are of but little benefit to the nation (for example the last council held cost the nation $700.00 for edibles alone and did no business) is for the department to give special orders in reference as to what amount shall be turned over to the Chiefs and the balance paid to heads of families in person.

I would respectfully ask that special instructions be given me in reference to the next payment.

On January 12, 1870, Captain Baldwin wrote the Commissioner as follows:

I would respectfully recommend that if practicable and in accordance with your approbation, the annuities now due the Seminoles be ordered paid, as they are more in need of money during the winter than in the summer season.

There are many without shoes and other articles of wearing apparel necessary to defend them from the rigors of the season for the want of which they have been dying of pneumonia during the past two months. I think their funds would be of great benefit to them now as they feel the want of proper clothing and would provide themselves with it had they the means of so doing.

On June 30, 1870, Captain Baldwin wrote him as follows:

I have the honor to recommend that the next payment be ordered made per capita to Seminole Nation for the reason that should it be made upon the same order of last payment the chiefs received the greater portion of the annuities while the people received as it were nothing.

I would respectfully call attention to last payment made by me in which 68 Law Makers and Chiefs were paid the bulk of the $25,000.00 [1] while the people received but a pittance of the annuities due them.

On September 1, 1870, he wrote him as follows:

Per capita payments are, in some instances, I think, a great evil; but as the system cannot be abolished, this nation [Seminole] having no constitutional government, and until such a form of government be adopted, I would recommend that the provisions of the treaty be rigidly enforced, and no moneys allowed to be paid except to the heads of families. Heretofore, as I have reported, the chiefs have been in the habit of taking out what amount they chose, allowing the balance to be paid *per capita*. This is an injustice, as few receive the bulk of their annuities.

Finally, on November 17, 1870, Captain Baldwin wrote the Commissioner as follows:

I have the honor herewith to report that it is the wish of the Head Chiefs of this Nation that the next payment of annuities be made to the officers and law makers.

The people to receive as in those cases nothing: I would respectfully call the attention of the Hon. Comm'r to the manner and amount in which a payment was made during the month of April last by me under instructions from your office, at that time the people needed many of the necessities of life; but a few leaders or chiefs pocketed the bulk of the annuities while the people received but a small portion.

It now costs the Seminole Nation from 12 to 13 thousand dollars for the payment of chiefs and law makers (for a population of less than 2,300 souls) who do nothing but eat and smoke.

I would respectfully recommend that the next payment be ordered to be made per capita, as during the winter months many who are in indigent circumstances die from exposure and want. And I would also recommend the payment be made as early in the month of January 1871 as practicable as the months of January and February are the most severe.

(b) During each of the years 1871, 1872, and 1873, Henry Breiner, who had succeeded Captain Baldwin as Indian

[1] The $25,000.00 referred to is itemized in finding 5.

Agent, paid into the treasury of the Seminole General Council the sum of $12,500, or a total of $37,500, pursuant to resolutions or acts of the General Council of the Nation.

The resolution of 1871 was for the expressed purpose of paying indebtedness incurred for salaries of its officers and other claims against its government. In 1872 the amount was stated to be for smiths shops, payment of smiths, and for governmental business. In 1873 the resolution of the Council did not list the particular items for which the money was to be used.

The money so paid was used in settling obligations of the Nation and paying expenses of the national government.

May 31, 1871, Indian Agent Breiner wrote the Commissioner of Indian Affairs as follows:

> I have to acknowledge, at this late date, the receipt of your communication of March 30, 1871, enclosing tabular statement of Seminole funds to the amount of $14,250, placed to my credit in the National Bank of Lawrence, Kansas, with instructions for the payment of said funds to the Seminoles.
>
> I have drawn the funds from the bank, and have complied in the use of those funds, with instructions from the Department, and with the treaty stipulations, as nearly as I could. In my communication to the General Council in reference to the payment, I quoted the instructions of the Department in reference to the matter. In reply the council stated that the $13,000 would not liquidate their national debt, and made the request for me to pay to the Seminole Treasurer the whole amount, to enable them to pay their creditors pro rata. I then asked that the council would state in their demand for the funds, the whole amount of their indebtedness, and have it duly certified, which they did, and the money was paid as authorized by them.
>
> It was understood by the whole Nation that this payment was to be made in this way, and I have heard of no complaints against it. But it is understood, and so stated to me by the chief, that the next payment is to be made per capita. So far as I have learned, the manner in which they have liquidated part of their old debt has proven satisfactory to the creditors. * * *

Under date of December 20, 1871, Indian Agent Breiner advised the Commissioner of Indian Affairs, in part, as follows:

> In reference to the Act I will say that I deemed it unnecessary to send it at the time for the reason that the Seminole Council had decided that the next annuity should be paid per capita by the agent, which was done on the 9th of November 1871. I am not fully convinced that the Seminoles are capable of managing their financial affairs economically and advantageously; yet if the Honorable Commissioner should authorize the agent to make the payments to the treasury it would relieve him of much writing but if we take their interests into consideration I would say that they be advised from the Department to allow the payments to be made as usual, i. e., every alternate payment to be made per capita and the other payments to be paid to the treasury for Government purposes.

January 5, 1872, the Acting Commissioner wrote the Indian Agent, in reply to his letter of December 20, 1871, in response to the request of the Seminole Chiefs that their national funds be paid thereafter to the treasurer instead of per capita, that it was not deemed advisable to change the manner in which annuities had theretofore been paid until the Department shall be fully satisfied that a proper disposition will be made of the funds if paid in the manner desired by the chiefs.

December 10, 1873, the Secretary of the Interior advised the Commissioner of Indian Affairs, with reference to an act passed by the Seminole Council requiring all annuity funds to be paid into the Seminole treasury, that the 8th article of the Treaty of 1856 stipulates that the payment of annuities shall be made to the Indians per capita and that the payment must therefore be made in accordance with the treaty stipulation.

Under date of January 31, 1874, the agent for the Seminoles wrote the Commissioner of Indian Affairs:

> The Seminoles are beginning to feel that they are capable of managing their financial affairs without the aid of an agent, and hence the demand to have the whole of their annuity paid into their treasury. On account of their urgency I may have concurred in this demand, and recommended that their request be complied with, while at the same time I was fully convinced that they are not capable of managing their affairs to the best advantage; yet I believe, and still believe that they would

be advised by me in matters of importance; and that, by allowing them to have the control of, say half their annuity, as recommended in my communication of the 1st inst., they would take a pride in making improvements, and in adopting a better system of education, and thus they would acquire a better and more practical knowledge of the management of their financial affairs than they ever could under the present management. But if they refuse to be advised, it would prove a failure, for they have, in common with all Indians, very little idea of the value and uses of money.

In the management of financial affairs the Creeks have proved a failure, and I would anticipate the same result from the Seminoles if they should be their own advisors. Their credit as a nation is now good wherever they are known, and I should regret exceedingly to see them pursue a course that would injure it, as well as themselves.

(c) Under date of September 7, 1874, the Indian Agent wrote the Commissioner of Indian Affairs in part as follows:

> When I sent the regular report for the quarter ending June 30th, 1874, I believe I neglected to explain the reasons for making the annuity payment in the way I did in place of per capita as the treaty provides.
>
> 1st. There was no specific instruction received until after most of the payment was made.
>
> 2nd. The Seminole Nation had outstanding drafts to the amount of $11,000 drawing 10% per annum which they promised to lift at that payment, and which had then been delayed three months longer than the time they had assured the holders that they would be paid. The holders of these drafts, to the amount of over $6,000 had drawn on them at 10% discount in St. Louis with the promise that they would be paid about the 1st of April.
>
> 3rd. The Council had decided that if I could not pay these drafts, they would appoint collectors to receive the money as it would be paid per capita. Under the circumstances, I thought it best and proper to lift the drafts, and to turn the balance over to their treasurer to pay their Blacksmith bills which would require the whole of the balance.

(The foregoing disbursements, referred to in paragraphs (a), (b), and (c), comprise the total sum of $66,422.64, referred to in finding 3.)

6. On January 9, 1874, the Commissioner of Indian Affairs wrote the Secretary of the Interior as follows:

> Sir: I have the honor to call the attention of the honorable Secretary of the Interior to the request of the Seminole Nation, through the Indian agent of that tribe, that hereafter the annuity payments to the Seminoles be paid to the authorities of the nation, to be disbursed under their direction, instead of being paid per capita, as provided for by the treaty of 1856.
>
> By the terms of the treaty, interest upon their funds amounting to $25,000 per annum is to be paid semi-annually per capita. The Seminoles desire to have it paid into their national treasury, in order to enable them to apply a portion of this money for educational and mechanical purposes of common benefit to the tribe, and also to defray the expenses of the national government. In the United States Statutes of 1870, vol. 16, page 360, it provided for, as follows:
>
> "That in every case where annuities are provided to be paid to any Indian tribe, it shall be the duty of the Secretary of the Interior to expend the same for such objects as will best promote the comfort, civilization, and improvement of the tribe entitled to the same: *Provided*, That the consent of such tribe to such expenditures can be obtained, and no claims for supplies for Indians, purchased without authority of law, shall be paid out of any appropriation for expenses of the Indian Department or for Indians."
>
> If this provision is in the nature of general legislation, it will allow of the proposed change.
>
> I believe a substantial compliance with this request will be both expedient and beneficial. There are certain necessary governmental expenses for this nation which cannot well be otherwise provided for, and the present school-fund is not sufficient for the tribal purposes. Besides, there are serious objections to paying any money in hand to Indians.
>
> The tendency of such payment is naturally to pauperism rather than to civilization.
>
> There is danger, however, if these funds are placed entirely in the control of those who may for the time be in authority, that the nation will not always receive its just benefit under the terms of the treaty.
>
> To prevent this possible evil, as well as the evil of per capita payment, I respectfully invite the attention of the Hon. Secretary to the expediency of requesting from

Congress authority to expend this Seminole fund, under direction of the Secretary of the Interior, for their national and other beneficial purposes. With this discretionary power lodged in the Department, such control can be held over the expenditures by national authorities of the Seminoles as will be likely to insure an economical and beneficial use of the nation's funds.

Upon this recommendation, the Secretary of the Interior wrote the Speaker of the House of Representatives, under date of January 9, 1874, transmitting draft of a bill providing for the manner of paying annuities to the Indian tribes. In this letter the Secretary expressed the hope that the proposed bill would become law and also stated:

The Seminoles are considerably advanced in civilization, and have a national government, and as a nation are desirous of having the whole amount accruing annually upon the sum invested as above described, or at least a large portion thereof, paid into the national treasury of their nation, to be disposed of under the laws of the nation, for such purposes connected with their civilization and improvement as the national council may deem best.

I have no doubt of the propriety of complying with their wishes, at least to some extent, and I am equally clear that such portion of their annuities as is not paid into the National Treasury should be expended by the Indian Office, with the sanction of the Secretary of the Interior and the President of the United States, in promoting the general comfort, civilization, and improvement of these Seminoles. In this connection I deem it my duty to refer to a recommendation contained in my annual report, namely, that all annuities, instead of being paid to Indian tribes per capita, be expended, as here indicated, in promoting their general welfare, civilization, and improvement. The payment of cash to individual Indians has, according to all the experience furnished by the Indian Office, tended to produce debauchery and demoralization, rather than to advance the civilization or improvement of Indian tribes.

By the second section of the Indian appropriation act for the year 1870 (Stats. at Large, vol. 16, p. 360), provision is made for the expenditure of annuities, provided for in that act, in such manner as in the opinion of the Secretary of the Interior "will best promote the comfort, civilization, and improvement of the tribe entitled to the same." It may have been the intention of Congress to make the section here referred to applicable

not only to annuities for which appropriations were then made, but to all annuities therein provided for, and thereafter to be authorized.

On these recommendations Congress passed the Act of April 15, 1874 (18 Stat. 29).

7. It is not shown that the officers of the United States authorizing the disbursement of the annuities to the tribal treasurer of the Seminole Nation, on order of its General Council during the years 1870 to 1874, knew that the General Council was corrupt, venal, or false to its trust in the discharge of its duty to the Seminole Nation; nor that said officers of the defendant acceded to demands made by the General Council which were not in the honest judgment of its officers for the best interest of said Seminole Nation; nor is it shown that during said years the Seminole General Council was in fact corrupt, venal, or false to its trust in the discharge of its duty to the Seminole Nation.

8. The Seminole Nation received the benefit of the payments in the sum of $66,422.64.

9. During the fiscal years 1899 to 1907, both inclusive, the sum of $864,702.58 was paid into the treasury of the Seminole Nation by the United States, the items making up the total being as follows:

$212,500, interest on $500,000 paid pursuant to Article 8 of the Treaty of 1856 (11 Stat. 699).

$29,750, interest on $50,000 under Article 3 of the Treaty of 1866, to be applied in support of schools (14 Stat. 558).

$622,156.87, interest on $1,500,000 deposited in the Treasury of the United States pursuant to the Act of Congress of March 2, 1889, which Act directed that said interest "be paid semiannually to the treasurer of said [Seminole] Nation" (25 Stat. 980, 1005).

$295.71 from an account known as "Indian Moneys, Proceeds of Labor."

All of the foregoing payments were made during the fiscal years 1899 to 1907, both inclusive.

10. During the years 1899 to 1907, both inclusive, the Seminole Nation of Indians, living on land located in the Indian country which later became part of the State of Oklahoma, was governed by a General Council composed of the

band chiefs and other representatives of the several bands of the Nation.

John F. Brown was the principal chief or "Governor" of the Nation during this period. His brother, Andrew Jackson Brown, generally known as Jackson Brown, was treasurer of the Nation during the time in question. Jackson Brown had been treasurer for many years prior to this time, and John F. Brown had been the principal chief for many years prior to this time, with the exception of one term, when he was defeated for reelection.

11. The Seminole Indians had migrated, some years earlier, from Florida to the Indian country hereinabove described. They had owned negro slaves during their residence in Florida. Upon the emancipation of the slaves, the negroes among the Seminoles became freedmen and were organized or incorporated into bands, thereby becoming members of the tribe or Nation. The Seminoles who migrated from Florida to the Indian lands of the west (not all of the Seminoles moved from Florida) therefore included some negroes.

Before the migration, a white man named Brown, said to have been a Scotch physician, had made his home among the Seminoles in Florida. He married an Indian girl, after providing her with some degree of education in schools conducted by whites. Several children were born of this union, among them John F. Brown and Andrew Jackson Brown.

In 1899, John F. Brown was 56 years of age, having been born in 1843, and had held the position of Governor, as above described, for many years. His tenure in that office extended over a period of 35 years, subject to a single interruption of one term of three or four years.

The Seminoles elected their principal chief or Governor by popular vote. When an election was to be held, the members of the tribe eligible to vote assembled at the Council House. The candidates for office took up positions facing each other, and the voters took positions behind the candidates of their choice. The election was determined by the "counting of noses."

It does not appear whether Jackson Brown was appointed or elected to the office of treasurer of the Nation. He did,

however, continue in office as treasurer of the Seminole Nation over a period of many years, beginning long before 1899 and extending after 1907.

John F. Brown was the responsible, directing head of the Seminole Nation during his tenure of office, which included the period in question. He was the Governor of the Nation in fact as well as name. There were votes in the General Council in opposition to his policies from time to time, but for the most part he was able to dominate and control the policies of the General Council. He appears, however, to have maintained control by majority vote, and there is no evidence of coercion or corruption in the maintenance of such majority support.

12. Pursuant to section 16 of the Act of March 3, 1893 (27 Stat. 612), a commission was appointed for the purpose of securing an agreement from each of the Five Civilized Tribes for the extinguishment of the tribal title to lands within the Indian territory and for an allotment of these lands to the Indians in severalty so that a State embracing these lands could be created. This commission was known as the Dawes Commission. It conducted negotiations with the Indians over a period of a number of years. On November 20, 1894, it made a report to the Secretary of the Interior, a portion of which reads as follows:

> Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available.

On November 18, 1895, it made a report, in which it said:

> The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches

> are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect.

However, in that part of its annual report for 1899 dealing with the enrollment of citizens of the Seminole Nation preparatory to making allotments of land to them, it said:

> The Seminoles, as has already been seen, are the fewest in numbers of the Five Tribes, and their government has been free from corruption. The rolls of the tribe, while crude in a measure, were found free from all irregularities of a fraudulent character.

On December 16, 1897, the Dawes Commission entered into an agreement with the Seminoles, in which was incorporated the following provision:

> When this agreement is ratified by the Seminole Nation and the United States the same shall serve to repeal all the provisions of the Act of Congress approved June seventh, eighteen hundred and ninety-seven, in any manner affecting the proceedings of the general council of the Seminole Nation.

13. Sometime prior to 1899 the Browns (John F. and Jackson Brown) established two general stores, one at Wewoka, site of the Council House and therefore the capital of the Nation, and one at Sasakwa. John F. Brown lived at Sasakwa, while Jackson Brown made his home at Wewoka and maintained his office at the Wewoka store, known as the Wewoka Trading Company.

Practically all of the testimony pertaining to the conduct of business and the credit extended at these stores relates to the Wewoka Trading Company.

After the opening of the Wewoka Trading Company, and sometime before 1894, the store began the practice of issuing a form of scrip, known among the Indians as "chokasutka," which was redeemable in merchandise at the store.

During the period 1899 to 1907 each Seminole man and woman was entitled to receive head payments in the approximate amount of $14.00 per year.

Upon application by an individual Indian, the Brown stores would issue to him chokasutka up to the amount of the next head payment to which he or she was entitled. Some

Indians received all of their next head payment in chokasutka, others received a part, and others none at all.

Records were maintained by the Wewoka Trading Company so that each member of the tribe might receive the scrip in such amounts and at such times as desired, up to the limit of the head payment that would be due to him at the end of the year.

When the money for the head payments was received from agents of the United States, it was delivered to the treasurer, A. J. Brown, with the full knowledge of the members of the Nation. An accounting was then made, and each Indian received credit for his head right. If he had used it up in scrip, he received no money; but if he had not withdrawn his allowance in whole or in part, he received the amount due him in cash. If he had not used all of the chokasutka issued to him, he could turn in the unearned coupons for cash or he could keep them and trade them out later.

14. The sale of liquor was prohibited within the confines of the lands occupied by the Seminoles. Saloons were operated by white men, however, just outside the borders of the Seminole lands. Seminole Indians on occasion would trade their chokasutka to the saloonkeepers for liquor, or sell the chokasutka to white men for cash and use the cash to buy whiskey.

After stores other than the Wewoka Trading Company came to Wewoka, Seminoles holding chokasutka sometimes traded at such stores, exchanging the scrip for goods on such terms as they could obtain, or paying for the goods with cash obtained by trading chokasutka for it.

The white men paid for the chokasutka the amounts for which the Indians were willing to relinquish it. The average exchange price appears to have been about 50 cents on the dollar, in terms of cash, for chokasutka, and somewhat higher when chokasutka was received for goods.

The Wewoka Trading Company redeemed chokasutka at face value by receiving it in exchange for goods on the shelves of the store at the prices listed thereon, making no distinction between presentation by white man or Indian.

Toward the end of the period in question, in 1905 or 1906, redemption of a sizable sum of chokasutka in the hand of a

white saloonkeeper was refused, with the explanation as given by Governor John F. Brown that it was desired to discourage the practice of selling liquor to Indians.

Except for this instance, the Brown stores appear to have redeemed the chokasutka at face value for any holder thereof.

It is not shown whether or not prices on goods at the Wewoka Trading Company were higher than the prices of similar goods at other stores.

A small minority of Indians were able men and skilled in trading and business, but the majority of the full-blooded Indians had little knowledge or appreciation of the value of money, having, as the witnesses described it, no more business acumen than an average 12-year-old white child.

The Wewoka Trading Company also made credit loans to white men, extending credit that was redeemable in goods at the store. A discount was charged for such loans, the borrower agreeing to repay an amount in excess of the amount of credit entered and subject to withdrawal.

A discount of 10 percent was charged the Indians when chokasutka was issued to them; in other words, if they had $50.00 coming to them, they would be issued chokasutka in the amount of $45.00.

15. In 1905 Henry C. Lewis, an investigator for the Department of Justice, was sent to Wewoka to make an investigation of this practice. He reported in part as follows:

> When the credit is extended they are given a book containing the due bills and in this book is entered the particular appropriation which is to cover the advance in goods and the amount of advance so given, which of course, is the same amount as is given in due bills, so that when the Indians ask for $50.00 in credit upon a certain appropriation they are debited on the books of the company with fifty dollars, but are given only forty-five dollars in due bills, and consequently, get only that amount in goods. * * *
>
> * * * * *
>
> To charge a discount where goods are given on credit is not unusual, but the system under which it is charged by this company is manifestly unfair, for the reason that when the money is received by the Trading Company the Indians may not have traded out all of the due bills which have been given them, or, in other words, all of

the credit extended to them. The result is that a discount has been charged on a part, at least, of the amount given out in due bills, goods for which have not been obtained, while as a matter of fact, the Trading Company has the money in its possession representing such part for which goods have not been obtained, the Indians retaining the remaining due bills to be traded out in the future. It would seem that there should be a discount in favor of the Indians instead of the Trading Company. The Indians are at liberty to turn in the remaining due bills, states Mr. Brown, but they never do so, another result of their pitiable ignorance. Indeed, some of them do not even understand what these due bills represent when they receive them. There is in the record the testimony of one girl who stated that she did not know what the due bills were and threw them away. In point of fact, she threw away so much money. It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking to the breaking up of the system, which can be done by having the appropriations distributed in some other manner.

Upon receipt of this report the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the practice be prohibited. The First Assistant Secretary of the Interior replied on April 26, 1906, in part, as follows:

You express the opinion that the Department cannot control the manner in which the Wewoka Trading Company transacts its business, but recommend that hereafter, when payments are made to Seminoles, such payments be made direct to the adult citizens and to the guardians of minors, and that during the time such payment is being made no member of said company or any of its agents or employes be allowed to be present.

In this the Department concurs, and such course should be followed hereafter, should no objections appear.

It is not considered advisable, as you suggest, to instruct the U. S. Indian Inspector for the Indian Terri-

tory to advise the Wewoka Trading Company "that the Department does not like its method of issuing coupon books and charging discounts, and that the Department would prefer that said business, insofar as the Seminoles are concerned, be transacted in the usual way and discounts and coupon books be not used or considered in the transaction of business of said company with Seminole Indians."

16. Both John F. Brown and Jackson Brown conducted an extensive merchandise and cotton business and an extensive credit business. They were considered wealthy men at one time, but due to bad investments they were in straightened financial circumstances in their later years.

17. The proof does not show that the Browns misappropriated $191,294.20 of tribal funds, nor that they misappropriated any other sum.

18. On January 29, 1898, the Secretary of the Interior transmitted to the President of the Senate, "for its information and consideration, a copy of a paper which purports to be a remonstrance adopted by a mass convention of members of the Seminole tribe of Indians against the ratification of the said agreement [the agreement with the Seminole Nation] and transmitted to this Department by Hulbutta, as second chief of the Seminole Nation, in a letter dated the 24th instant, a copy of which is also inclosed herewith."

The protest was signed by twelve members of the Seminole tribe, allegedly on behalf of 100 male citizens of the Seminole Nation who had met in convention. Protest was made against ratification of the agreement because it had not been submitted to a vote of the people, and it was also stated:

> The national funds of the Seminoles are absorbed by only a few of their citizens who have grown rich at the public expense, and we firmly believe that these few persons are oppressing the poorer ones. As to the assertions pertaining to the Seminole government, we cite the following: In the year 1889 an agreement was entered into by the United States and the Seminoles by which the latter relinquished to the United States their title to lands known as Oklahoma for the consideration of $1,912,942.02. The Seminoles placed on interest with the United States $1,500,000. They withdrew $221,647.80, expending this amount for various national purposes. There was the sum of $191,294.20 which never

entered the treasuries of the United States or the Seminoles. The reply given to us about the disposition of this money by our authorities was that during the transfer of these lands to the United States there was a lawyer who negotiated the agreement and took that amount for his pay. The name of the lawyer was never mentioned and no receipt of the alleged deal was ever shown. We call your attention to this. We ask that you take note of the townsite laws of Wewoka and see to whom only these laws are beneficial and whom they oppress. We call your attention to the fact that the annuities due the Seminoles by law July 1 are never paid until in October.

> We beg leave to state further that we have no law regulating the bond of our treasurer or chief, and according to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. Therefore, in conclusion, we desire to say that while the legislation has not been in line with our wishes, we must perforce of circumstances accept the inevitable. We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. We earnestly ask you to reconsider the new treaty as a whole in regard to us and relieve us from its obligations. We most respectfully ask you that we be allowed to hold our lands in common, as provided for in the treaty of 1866, and that we be given time to consider and change from our present manner of life. * * *

There is no proof in the record to support the charge that "the national funds of the Seminoles are absorbed by only a few of their citizens who have grown rich at the public expense, and we firmly believe that these few persons are oppressing the poorer ones."

19. In 1901 a Memorial was addressed to the members of the Senate and House of Representatives of the United States, signed by A. W. Crain, B. F. Bruner, Nero Noble, Geo. Ripley, Alex Harjo, and John Jefferson. In that Memorial it is stated:

> Our tribal government has long ceased to represent the wishes of the people, but only represents the will of an oligarchy, which has grasped all power and hemmed

themselves about with prerogatives and laws that makes us unable to reform them. This is our government.

We have an income of over one hundred thousand dollars. The mercantile interests of the tribe are controlled by two men; these are the Governor and his brother, the Treasurer, who is also Superintendent of schools. There is no Auditor.

The officers are under no bond. The Treasurer's report is made to an uneducated people. No laws can be made to censure or for dismissal of officers without the Governor's consent. An obedient officer is sure of his position.

The people have become so impoverished that the very few having any means control the trade and credit of the tribe. There can be no hope of reform under the present conditions, nor the free expression of opinion.

In this Memorial it is also stated:

> We believe the well-thinking people of the land know nothing of the true state of affairs here; did they, they would know that, astute as the officials of the Interior Department are, they have been duped and made tools of through all by a few obscure Indians who have amassed large fortunes and brought their tribe to poverty, and still contemplate greater wrongs. This United States Commission, now assuming to settle all Indian questions, and giving to each his share, does not inspire us with confidence. We believe a large United States appropriation for this work only means a new manner and guise for despoiling us. There is no need of deception; they are powerful enough to deal candidly. Town sites are cared for more than Indians. The common people are not opposed to the wishes of the United States government. Our tribal funds as now used are only a means to further the interests of schemers, add to the profits of merchants, and corrupt the officials. * * *

There is no proof in the record to support the charges made in this Memorial.

20. There is no proof in the record to support the charge of wrongdoing by Andrew Jackson Brown in the Loyal Seminole Payment matter.

21. The proof does not show that the Seminole General Council during the years from 1899 to 1907 was corrupt, venal, or false to its trust in the discharge of its duty to the Seminole Nation.

22. The proof does not show that the tribal officers during the years 1899 to 1907 were mulcting the Nation.

23. So far as the proof shows, the Seminole Nation received the benefit of such sums as were expended by the tribal treasurer during the years 1899 to 1907.

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24. By the treaty of March 21, 1866 (14 Stat. 755) the United States granted to the plaintiff 200,000 acres of land immediately west of the eastern portion of the Creek lands. Article III of said treaty provides in part as follows:

> * * * The United States having obtained by grant of the Creek Nation the westerly half of their lands, hereby grant to the Seminole Nation the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866 [June 14, 1866], following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. * * *

25. In 1871 one Frederick W. Bardwell located the western boundary of the Creek tract. His survey was approved by the Secretary of the Interior on February 5, 1872. This line became the eastern boundary of the Seminole national domain, as provided for in the treaty of March 21, 1866. About two months thereafter Nathaniel Robbins was employed by the defendant to run the western line of plaintiff's domain so as to include the 200,000 acres granted plaintiff by defendant. This survey was completed in 1871 and was

approved by the Secretary of the Interior February 5, 1872. According to Robbins' calculations, the number of acres included between the Canadian River on the south, the north fork of the Canadian River on the north, the Bardwell line on the east, and the Robbins' line on the west was 200,000.03 acres. The parties now agree, however, and it appears that there was included within these boundaries only 189,648.18 acres.

26. Pursuant to a treaty entered into with the Pottawatomie Indians on February 27, 1867 (15 Stat. 531), a tract of land was set aside for them as a reservation immediately to the west of the Seminole lands, and when Nathaniel Robbins located the western boundary of the Seminole lands the Pottawatomies occupied all the territory immediately to the west thereof; but no patent was ever issued to them therefor, as was provided for by the above treaty.

27. By an agreement ratified by the Act of March 3, 1891 (26 Stat. 989, 1016), the Pottawatomies ceded to the United States the lands which had been set apart for them as a reservation, referred to above. This agreement and ratifying Act provided for allotments of portions of these lands to the Pottawatomie Indians in severalty and the opening of the balance for settlement by white settlers.

Pursuant to this agreement 3,818.21 acres of the 10,351.82 acres of the Seminole lands lying to the west of the Robbins line were allotted to members of this tribe, and in the following years the balance was patented to white settlers.

Year	Nature of Patent	Acres
1895	Fee Patents	124.03
1896	do	124.16
1897	do	69.63
1898	do	113.26
1899	do	899.80
1900	do	280.23
1901	do	966.51
1902	do	594.80
1903	do	540.61
1904	do	72.42
1905	do	409.45
1906	do	1,857.53
1907	do	197.64
1908	do	77.74
1909	do	84.68
1910	do	64.48
1913	do	56.64

Upon discovery of the fact that these Seminole lands had been allotted to the Pottawatomie Indians and patented to white settlers, no action was taken to cancel them, and the defendant intends to take none, but elects to stand upon what has been done.

28. That there had been an error in the location of the western boundary of the Seminole lands was not discovered until a number of years after Robbins had made his survey. As the result of a geological survey made in 1895 and 1896, it was discovered that there was a shortage in the entire Seminole domain, comprising the 200,000 acres granted by the treaty of 1866, plus an additional 177,397.71 acres later granted to the Seminoles by the defendant, but it was not known until some years after that, the exact date of which does not appear, that the shortage in the entire domain was due to the incorrect location of the western boundary. Immediately upon discovering a shortage in the entire domain, the nation made demand for rectification of the error, and they have never, with full knowledge of the facts, agreed that the Robbins line was the true western boundary of the 200,000-acre tract.

29. The average value of all the lands so taken by the defendant in the years 1892 to 1913 was $7.00 an acre.

30. Under article III of the Treaty of 1866 it was agreed that $40,362 of the consideration due the Seminole Nation for the cession of lands to the United States should be used for subsisting the Seminole Indians. That amount was disbursed for that purpose during the fiscal year 1867. By act of July 27, 1868 (15 Stat. 198, 214), Congress appropriated $31,083.79 for the following purpose:

> To supply a deficiency in appropriation for subsisting Seminole Indians, thirty-one thousand and eighty-three dollars and seventy-nine cents; which amount shall be deducted from any money or funds belonging to said tribe of Indians.

The sum so appropriated was used by defendant during the fiscal year 1869 for the purchase of provisions for the Seminole Indians, but no deduction from plaintiff's funds has been made on that account as required by said act.

31. In undertaking to locate the Seminole Indians on the 200,000 acres provided for them by the treaty of 1866 prior to a survey, an error was made with respect to the location of the eastern boundary of the tract as described in the treaty, as a result of which the Seminoles were placed in possession of lands owned by the Creeks which were located east of and adjoining the tract of 200,000 acres. Upon these lands improvements were placed by the Seminoles before the error was discovered. By act of March 3, 1873 (17 Stat. 626), the Secretary of the Interior was authorized to negotiate with the Creeks for the relinquishment to the United States of such parts of their country as may have been so occupied by the Seminoles. Thereafter the Creek Nation, for a consideration of $175,000, ceded to the United States 175,000 acres of its lands located east of and adjoining the 200,000 acres set aside for the Seminoles under the treaty of 1866. In 1888 a survey was made for the purpose of establishing the eastern boundary of the tract of 175,000 acres, but by reason of error in the survey the area inclosed was 177,397.71 acres, for which the Creeks were paid $175,000. This became a part of the Seminole reservation, in addition to the 200,000 acres, more or less, and was disposed of either by allotment to members of the tribe or by sale for the account of the tribe.

32. During the period from the beginning of the fiscal year 1857 and ending with the fiscal year 1866, the United States expended for the benefit of the Seminole Nation the sum of $42,861.54 for the following purposes:

Purpose	Gratuity Rept., G. A. O. pages	Amount
Agency buildings and repairs	27	$5,200.00
Clothing	142, 143	610.00
Education	38, 39	2,500.00
Expenses of delegates	127, 141	5,155.70
Fuel, light, and water	52, 53	98.50
Miscellaneous agency expenses	52, 53, 142	1,239.50
Pay of Indian Agents	125, 163	15,475.05
Pay of Interpreters	52, 124	3,910.00
Pay of miscellaneous employees	52, 141	158.50
Presents	127	168.80
Provisions and other rations	141, 142, 163	4,657.57
Transportation, etc., of supplies	52, 53	3,687.92
Total		42,861.54

Of the foregoing items the amounts spent for the following were spent gratuitously: clothing, education, presents, provisions and other rations, totalling $7,936.37.

33. During the period beginning with the fiscal year 1867 and ending with the fiscal year 1898, the United States expended for the benefit of the Seminole Nation the sum of $27,720.90 for the following purposes:

Purpose	Gratuity Rept., G. A. O. pages	Amount
Education	37, 54, 55	$171.89
Expenses of delegations	40, 143	4,309.00
Feed and care of livestock	53, 54, 55, 67	345.00
Fuel, light, and water	54, 56, 67	68.50
Medical attention	55, 177	425.68
Miscellaneous agency expenses	27, 40, 53–57	6,749.94
Pay of Indian Agents	40, 55, 125	10,410.77
Pay of interpreters	57, 124	3,384.50
Pay of miscellaneous employees	54–56	180.00
Provisions and other rations	67, 143	659.12
Transportation, etc., of supplies	40, 53, 54	1,016.50
Total		27,720.90

Of the foregoing items the following were spent gratuitously: education, expenses of delegations, feed and care of livestock, medical attention, provisions and other rations, totalling $5,910.69.

34. During the period beginning with the fiscal year 1899 and ending with the fiscal year 1934, the United States expended for the benefit of the Seminole Nation the sum of $32,309.21 for the following purposes:

Purpose	Gratuity Rept. G. A. O., pages	Amount
Appraising	43, 47, 48	$3,474.93
Clothing	167–168	5.42
Enrolling	42, 45, 46, 48	432.96
Education	96, 97, 98, 104, 105, 107, 109, 144–151, 152–154, 173, 174.	20,377.89
Expenses of delegates	153	149.90
General office expenses	14, 16, 43, 45, 47	2,539.40
Livestock	167	35.00
Medical attention	51, 152	1,124.12
Miscellaneous agency expenses	64, 164, 165	109.69
Pay miscellaneous employees	167	10.00
Per capita payment expenses	14, 16, 78	507.96
Preservation of records	128	40.15
Probate expenses	129, 136	2.00
Protecting property interests	137, 138	17.50
Provisions and other rations	168	216.00
Sale of townsites	18, 20	1.65
Surveying	43, 45, 48	501.95
Surveying and allotting	25	2,663.24
Traveling expenses	76, 77	99.45
Total		32,309.21

Of the foregoing items the following were spent gratuitously: clothing, expenses of delegates, livestock, medical attention, provisions and other rations, totalling $1,529.54.

35. During the period from the beginning of the fiscal year 1857 and ending with the fiscal year 1866, the United States expended for the benefit of the Seminole and Creek Nations of Indians the sum of $1,852.75 for the following purposes:

Purpose	Gratuity Rept. G. A. O., page	Amount
Miscellaneous agency expenses	52	$370.75
Pay of miscellaneous employees	52	1,027.00
Transportation, etc., of supplies	52	455.00
Total		1,852.75

None of the above items were spent gratuitously.

36. During the period from the beginning of the fiscal year 1867 and ending with the fiscal year 1898, the United States expended for the benefit of the Seminole and Creek Nations of Indians the sum of $1,572.16 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Annuity expenses	53	$1,316.66
Miscellaneous Agency expenses	54, 57	230.50
Pay of Interpreters	124	25.00
Total		1,572.16

None of the above items were spent gratuitously.

37. During the fiscal years 1857 to 1934 the Seminole Tribe of Indians composed, approximately, 15 per cent of the total population of the Creek and Seminole Tribes, but what portion of the expenditures set out in findings 35 and 36 was made for the benefit of the Creeks and what portion for the benefit of the Seminoles does not appear.

38. During the period from the beginning of the fiscal year 1867 to the end of the fiscal year 1898, the United States expended for the benefit of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations of Indians the sum of $305,292.80 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Agricultural implements and equipment	56, 58, 59, 68	$152.20
Feed and care of livestock	56–59, 67	1,396.28
Fuel, light, and water	56–64, 67	791.50
General office expense	41–42	135,219.60
Hardware, glass, oils and paints	56, 59	11.24
Livestock	56, 58, 59	547.50
Medical attention	56–59	161.65
Miscellaneous agency expenses	56–64, 172	4,139.91
Pay and expenses of farmers	59	226.67
Pay and expenses of Indian police	58, 59, 63, 68, 123, 169	80,983.17
Pay of Indian agents	121, 125	37,389.53
Pay of miscellaneous employees	56–64, 73	43,857.75
Pay of skilled employees	56–59, 68	415.80
Total		305,292.80

Of the foregoing items the following were spent gratuitously: agricultural implements and equipment, feed and care of livestock, livestock, medical attention, pay and expenses of farmers, totaling $2,484.30.

During the foregoing period the Seminole Tribe of Indians composed approximately 4.38 percent of the total population of the Cherokee, Creek, Chickasaw, Choctaw, and Seminole Nations. Allocating the foregoing expenditures to the several tribes on the basis of their population, the defendant spent gratuitously for the benefit of the Seminole Nation the sum of $108.81 during the period and for the purposes shown above.

39. During the period from the beginning of the fiscal year 1899 to the end of the fiscal year 1934 the United States expended for the benefit of the Creek, Cherokee, Chickasaw, Choctaw, and Seminole Nations of Indians the sum of $11,416,066.55 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Agricultural aid	23, 24, 166, 167, 168	$24,331.81
Allotting	16, 17, 20	36.65
Appraising	44–47, 49	18,665.01
Appraising and selling lands	14–20	205,959.07
Appraisal and sale of restricted lands	26	24,999.20
Automobiles and repairs	22–24, 51, 70, 166–167, 180	23,799.99
Construction and maintenance of Claremore Hospital.	50–51, 84, 92, 150–151	77,127.98
Copying allotment records	69	14,648.72
Education	28–36, 50–51, 83, 85–105, 106–114, 144–154, 167–168.	2,179,846.86
Equalization of allotments, expenses	14, 16, 20, 47, 49	207.88
Examining records in disputed citizenship cases.	44, 45, 49	26,105.59

Purpose	Gratuity Rept. G. A. O. pages	Amount
Feed and care of horses	74-80, 139	$3, 371. 96
Fuel, light and water	64, 71	108. 20
General office expenses	14, 16-20, 42-49	4, 218, 065. 39
Household equipment	166-168	2, 625. 33
Incidental expenses	66-74, 80, 139-140	30, 115. 98
Investigating leases	116, 117	29, 955. 95
Leasing of mineral and other land	14, 16, 20, 42, 49	4. 514. 39
Livestock	68, 167, 168	1, 290. 00
Medical attention	51, 152, 154, 170, 177	976. 41
Miscellaneous agency expenses	22-24, 51, 64-68, 70-72, 164-174.	215, 416. 02
Oil and gas expense	16, 17, 19, 20	7, 028. 28
Oil and gas mining supervision, allotted lands	118, 119	85, 703. 40
Pay and expenses of farmers	23, 24, 81-83, 115	327, 566. 96
Pay and expenses of field matrons	81-83	6, 217. 32
Pay and expenses of Indian police	71, 72, 81-83, 123	174, 860. 56
Pay of Indian agents	121	30, 250. 00
Pay of clerks	120	4, 721. 62
Pay of Indian inspectors	79, 80, 122	22, 381. 97
Pay of interpreters	81-83, 164-168	125, 783. 64
Pay of miscellaneous employess	23, 51, 64, 67, 71, 72, 74-83, 120, 139-140, 164-168.	1, 717, 185. 80
Pay of superintendents	126, 167, 168	11, 220. 25
Per capita payment expenses	15, 66, 67	141. 68
Preservation of records	128	8, 886. 62
Probate expense	72, 81-83, 121-136, 166, 168	1, 053, 120. 71
Protecting property interests	137-138	386, 847. 59
Protecting property interests of restricted members.	15-16	4, 741. 70
Provisions and other rations	167-168	139. 27
Purchase of horses	77, 139	720. 00
Removal of alienation restrictions	159-161	88, 346. 12
Sale of allotted lands	15	265. 12
Sale of restricted lands	15	1, 577. 09
Sale of town lots	15, 17, 18, 47, 49, 79, 80	250. 44
Sale of town sites	47, 49	416. 71
Sale of unallotted lands	15, 162	53, 538. 80
Surveying	15, 17, 18, 44-47	49, 695. 31
Surveying and alloting	25	7, 331. 24
Surveying segregated coal and asphalt lands	16, 21	6. 76
Surveying, sale, etc., of lands	71, 164-168	80, 809. 05
Timber estimating	15, 44	33, 776. 10
Transportation, etc., of supplies	56, 57, 60, 61, 64, 65, 71, 144-150, 166, 167, 174, 175.	7, 966. 50
Traveling expenses	66, 74, 80, 139, 140, 176	22, 401. 55
Total		11, 416, 066. 55

No finding is made on whether or not any part of these expenditures were gratuities.

The court decided that the plaintiff was entitled to recover the sum of $221,066.58 and that the defendant was entitled to offset against this amount the sum of $221,569.20 for gratuities expended for plaintiff's benefit. Since the amount expended by the defendant gratuitously for plaintiff's benefit exceeded the amount plaintiff was entitled to recover, the court decided as a conclusion of law that the plaintiff was not entitled to recover, and its petitions were therefore dismissed.

WHITAKER, *Judge*, delivered the opinion of the court:

These cases, Nos. L–51 and L–208, have been consolidated in accordance with the opinion and mandate of the Supreme Court in *Seminole Nation* v. *United States*, 316 U. S. 286, 651.

We shall first discuss case L–51. In that case the original petition was filed on February 24, 1930. An amended petition was filed on September 19, 1934, setting forth additional claims. On December 2, 1935, we rendered a decision holding the plaintiff was entitled to recover $1,317,087.27 (82 C. Cls. 135). The Supreme Court granted certiorari and reversed the decision of this court, on the ground, among others, that judgment had been rendered on claims first asserted in the amended petition which had been filed after the expiration of the statute of limitations fixed in the Act giving this court jurisdiction.

Thereafter, Congress passed the Act of August 16, 1937 (50 Stat. 650), authorizing the filing of an amended petition to set up the claims denied. A second amended petition setting up these claims was then filed, in which plaintiff made claim against the defendant on five items, set out in sections III to VII of its petition. We allowed recovery of $1,790.00 on item 1 (section III of the petition), $13,501.10 on item 2 (section IV), $3,097.20 on item 3 (section V), and we disallowed all of item 4 (section VI) and item 5 (section VII) (93 C. Cls. 500). The Supreme Court affirmed us as to items 1, 3, and 4, but remanded the case for further findings on items 2 and 5 (316 U. S. 286).

These items only are now before us. There is also before us the offsets to which the defendant is entitled for gratuitous expenditures made for plaintiff's benefit.

Item 2 is a claim based upon the defendant's obligation under article VIII of the Treaty of 1856 to pay to the tribe per capita $25,000 per year. We found that there had not been paid to the tribe per capita $92,423.74 of the amount so due, but that during the years 1870 to 1874, $66,422.64 of this amount had been paid to the tribal treasurer and to certain designated creditors of the tribe at the request of the General Council of the tribe, and that in 1907, $12,500.00 had been paid to the Indian Agent under authority of an act of Congress. Credit against the $92,423.74 was given for

these payments. Our decision on this item was affirmed, except as to the payments made to the tribal treasurer in the years 1870 to 1874.

The Supreme Court remanded the case with instructions to find whether or not at the time these payments were made to the tribal treasurer and to creditors of the tribe the General Council of the tribe was corrupt, venal, and false to its trust to the Seminole people, and whether at the time the payments were made the disbursing officers of the United States knew of such corruption, venality, and falsity, and if both questions were answered in the affirmative, whether the Nation got the benefit of the payments made.

Before discussing the case on the merits we must first consider the defendant's defense that we have no jurisdiction to render judgment for the payments made to the tribal treasurer in the years 1870 to 1874, because the plaintiff did not base its right to recover them upon the ground advanced by the Supreme Court, to wit, that, when the payments in part satisfaction of them were made to the tribal treasurer and to certain creditors of the tribe on order of the General Council of the tribe, the General Council was corrupt, venal, and false to its trust and that the officials of the United States making the payments knew that it was.

Whether or not plaintiff's petition is broad enough to permit assertion of such a ground, it was never in fact asserted in this court, either in briefs or argument or in any form whatever. On the contrary, the allegations of the petition, the requests for findings of fact, and the statements in the briefs show that plaintiff's claim was not based upon this ground. The defendant never understood that it was, and this court never understood that it was, and neither the defendant nor the court had any reason to think that it was.

Section IV of plaintiff's petition (item 2) merely alleges that defendant "either illegally disbursed or failed or neglected to disburse" the amounts appropriated by Congress to fulfill the treaty obligation. Why any of the disbursements were illegal was not stated. It is plain, though, that it was not based on the fact that the General Council was corrupt at the time these payments were made to the tribal treasurer and to certain creditors on order of the General

Council, because in section VII of its petition, relating to payments made in alleged violation of section 19 of the Curtis Act (item 5), it is alleged that "*since the passage of said Act of April 15, 1874*, it was reported by the officers of defendant that the Seminole tribal officials were misappropriating the Seminole tribal funds entrusted to them and robbing the members of the tribe of an equal share of the tribal income." [Italics ours.] The payments in question were made from 1870 to 1874, prior to the passage of the Act of April 15, 1874.

Plaintiff's request for findings of fact also shows that no claim was made on this ground. With respect to this item it reads in pertinent part:

> The United States disbursed the sums thus appropriated for the years involved, either by making direct payment *per capita* to members of the tribe, *or by cash payment to the treasurer of the Seminole Nation*, except for the fiscal years following, in which the amounts stated were neither disbursed to members of the tribe nor paid to the Seminole national treasurer. [Italics ours.]

No claim was made for payments to the tribal treasurer.

No claim is made for such payments in its brief. On the contrary, on page 39, in discussing the payments made in alleged violation of section 19 of the Curtis Act (item 5), it says:

> Before the passage of the Curtis Act, the Seminole Nation was entrusted with the disbursement of certain of its tribal income, the payments of which were authorized to be made to the tribal treasurer (Acts of April 15, 1874, 18 Stat. 29; and March 2, 1889, 25 Stat. 980, 1004). However, *soon after the passage of said Act of April 15, 1874, the Seminole tribal officials ceased to be representative of the majority of the tribe, and began using tribal moneys to further their own private interests.* [Italics ours.]

These statements are negations of a claim that the General Council was false to its trust during the years 1870 to 1874.

It is, of course, true that a disbursement to officials of the tribe who were corrupt, venal, and false to their trust would be an "illegal" disbursement; but the mere allegation that

the sums were "illegally disbursed," without an allegation of any facts to support the charge of illegality, complies neither with section 159 of the Judicial Code nor with Rule 10 of this court. Section 159 requires a claimant to "fully set forth in his petition the claim" and rule 10 requires him to set forth in his petition "a plain statement of the facts. * * *" No facts are alleged to show why the disbursements were illegal. It would be impossible from this allegation for the defendant to gain any intimation as to the basis of plaintiff's claim.

In *Merritt* v. *United States*, 267 U. S. 338, 341, the Supreme Court said:

> The practice of the Court of Claims, while liberal, does not allow a general statement of claim in analogy to to the common counts. It requires a plain, concise statement of the facts relied upon. See Rule 15, Court of Claims. The petition may not be so general as to leave the defendant in doubt as to what must be met. *Schierling* v. *United States*, 23 C. Cls. 361; *The Atlantic Works* v. *United States*, 46 C. Cls. 57, 61; *New Jersey Foundry & Machine Co.* v. *United States*, 49 C. Cls. 235; *United States* v. *Stratton*, 88 Fed. 54, 59.

The Jurisdictional Act under which plaintiff sued gave it the right to file an amended petition before January 1, 1938. Since no such petition was filed before that time setting up this ground of recovery, there is grave doubt of our authority to consider it. However, we do not pass on the question, since, as hereafter appears, we are of opinion plaintiff is not entitled to recover on the merits.

The defendent interposes the same defense to recovery on item 5.

In section VII of its petition dealing with item 5 plaintiff seeks to recover $864,702.58 paid to the tribal treasurer during the years 1899 to 1907 in alleged violation of section 19 of the Curtis Act. We held that section 19 of the Curtis Act did not apply to these payments and that plaintiff was not entitled to recover. The Supreme Court agreed that this section of the Curtis Act had no application to these payments, but remanded the case to us with instructions to find whether or not during the years 1899 to 1907 the General Council of the Nation was corrupt,

venal, and false to its trust and whether the disbursing officers of the defendant knew at the time the payments were made that this was so, and if so, whether the nation got the benefit of the money.

It seems plain that plaintiff did not seek recovery on this ground. In its petition dealing with this item plaintiff alleges that by the acts of April 15, 1874, *supra*, and of March 2, 1889 (25 Stat. 980, 1004), certain payments were authorized to be paid to the tribal treasury, but that after the passage of the Act of 1874, it was reported to defendant that the tribal officials were corrupt and were robbing the members of the tribe of the income to which they were entitled, and that, in order to correct such conditions, Congress enacted the Curtis Act, approved June 28, 1898 (30 Stat. 495), section 19 of which was set out. It was then alleged that the sum of $864,702.58 was paid to the tribal treasurer in violation of this section of this Act. Section VII of its petition concludes:

> Therefore, the defendant is liable to plaintiff in the amount of $864,702.58 thus illegally disbursed in violation of said section 19 of said Act of June 28, 1898.

The prayer of the petition reads:

> Wherefore, plaintiff prays that judgment be entered against defendant for the total amounts due plaintiff under said unfulfilled treaty obligations of defendant, *and for the total amounts of Seminole tribal funds illegally disbursed by defendant in violation of said section 19 of the Curtis Act*, together with interest on same at five per cent per annum; and that plaintiff may have such other and further relief as to the court may seem just and proper. [Italics ours.]

It is plain that recovery was sought because the payments were made in violation of section 19 of the Curtis Act, and not because at the time they were made the General Council was corrupt. There are allegations of corruption in the petition, but they are alleged to show the reason for the passage of the Curtis Act and for its applicability to the payments made; they are not made as a ground of recovery.

Plaintiff's request for findings of fact on this item requests only a finding on the amount of the payments during the

years in question. No request for a finding of corruption in the General Council is made. A large part of its brief on this item is devoted to allegations of corruption in the tribe, but this is all for the purpose of showing that section 19 of the Curtis Act was intended to apply to the character of payments for which plaintiff sued. Plaintiff asserted no right to recover except for the violation of section 19. Since no claim for recovery was made because the payments were made to corrupt officials, we did not consider its right to recover on this ground.

However, although plaintiff based its right to recover on the violation of section 19, it nevertheless did allege that as to the years 1899 to 1907 the tribal officials were corrupt and introduced proof to support this allegation, and under its prayer for general relief we suppose on our own motion we might have remanded the case for further proof to give defendant an opportunity to refute this charge, and if the facts warranted it, we might have rendered judgment on this ground. We think, at least, we had jurisdiction to do so, and that we now have jurisdiction to do so, a petition setting up these facts having been filed within the time fixed by the jurisdictional act.

The defendant also says we have no jurisdiction to adjudicate a claim based upon defendant's breach of its fiduciary duty to plaintiff, because the jurisdictional act conferred jurisdiction on us only of those claims "arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian Affairs." It says a claim arising out of a breach of a fiduciary duty is not one arising out of a treaty or an act of Congress. We do not think this defense is good. If the defendant has ever owed plaintiff the duty of a fiduciary, it owed it this duty when the treaties were signed and the Acts were passed on which plaintiff sues. Implicit in those agreements and in the Acts was the obligation to carry out their terms with the fidelity a fiduciary owes his ward. If in paying the amounts it had promised to pay, it paid them to a person it knew would misappropriate them, defendant has not discharged the obligation it undertook.

We do not understand this holding to be in conflict with what we said in *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, nor with the Supreme Court's decision in *Creek Nation* v. *United States*, 318 U. S. 629. It is in line with our decision in *Menominee Tribe of Indians* v. *United States*, 101 C. Cls. 22.

Since we think we have jurisdiction to render judgment for the payments claimed in item 5 on the ground that the General Council was corrupt and that at the time they were made the defendant knew this to be so, we shall consider the case on its merits.

First, as to fraud and corruption during the period from 1870 to 1874. The only evidence of corruption and fraud before the Commissioner of Indian Affairs at the time he authorized the payments to the tribal treasurer during this period, as requested by the General Council of the tribe, were the reports of the Indian Agent, Captain Baldwin. We do not consider the reports of John P. C. Shanks, dated August 9, 1875, and of A. B. Meacham, dated November 20, 1878, because they were received after the payments were made and, therefore, could not have charged the defendant with knowledge of any corruption and fraud at the time the payments were made.

Agent Baldwin assumed the duties of Indian Agent in July 1869. On November 3, 1869, he recommended that the next annuity payment be paid to the chiefs to pay their national debt, which seems to have been for salaries due the tribal officials, since, he said, "the amount appropriated for the support of the Seminole Govt., [sic] is not adequate." (This amount was fixed at $1,000 per year by the treaty of 1856.)

On December 6, 1869, he renewed this recommendation, stated what the national debt was, and for what contracted, but called attention to the fact that "they are in the habit of calling councils for any little thing that may arise and spending from 2 to 15 days without effecting anything whatever which would be of the least service to the nation, except in spending the funds." He, therefore, recommended that it be determined what amount was to be turned over to the General Council in the future and what amount was to be

turned over to heads of families, so that the chiefs and lawmakers would have no encouragement to run up these debts.

Thereafter, in the years 1871, 1872, 1873, and 1874, it became the practice to turn over to the General Council every other payment. It is for these payments and the payments made in 1870 that plaintiff sues.

It will be observed that Captain Baldwin did not recommend that none of these annuities be turned over to the General Council, but only that the amount to be turned over be definitely fixed. He had recommended a month earlier that some amount be turned over to them, "since the amount appropriated for the support of the Seminole Govt., [sic] is not adequate."

About a month later, on January 12, 1870, he recommended that the next annuity payment be paid per capita because needed to protect the people from the rigors of the winter season.

Six months later, on June 30, 1870, he again recommended that the annuities be paid per capita because the 68 chiefs and lawmakers had received the bulk of the $25,000 paid within the last year. (His report of May 1, 1870, shows that only $7,179.25 of the $25,000 had been paid per capita.)

On September 1, 1870, he stated "per capita payments are, in some instances, I think, a great evil," but he recommended that until the system could be abolished all annuities be paid per capita, since few of the people had been receiving "the bulk of their annuities."

On November 17, 1870, he wrote the Commissioner of Indian Affairs with reference to a request of the chiefs that the next payment of annuities be made to the officers and lawmakers. He said that when the last payment was made that the people needed many of the necessities of life, but that "a few leaders or chiefs pocketed the bulk of the annuities while the people received but a small portion." He, therefore, recommended that the next payment be made per capita.

The substance of all of Captain Baldwin's recommendations is that, while he believed some of the annuity payments should have been paid for the support of the govern-

ment of the tribe, he thought too much of them had been devoted to that purpose.

In the next year, one-half of the annuities were paid to the tribal treasurer and one-half per capita. Indian Agent Breiner, who succeeded Captain Baldwin as Indian Agent, recommended that this practice be continued. In his letter of May 31, 1871, he said that he paid the sum deposited to his credit for the use of the Seminoles in settlement of their national debt, and that "It was understood by the whole nation that this payment was to be made in this way, and I have heard of no complaints against it. But it is understood, and so stated to me by the chief, that the next payment is to be made per capita."

In his letter of December 20, 1871, he said:

> * * * I am not fully convinced that the Seminoles are capable of managing their financial affairs economically and advantageously; yet if the Honorable Commissioner should authorize the agent to make the payments to the treasury it would relieve him of much writing but if we take their interests into consideration I would say that they be advised from the Department to allow the payments to be made as usual, i. e., every alternate payment to be made per capita and the other payments to be paid to the treasury for Government purposes.

Finally, on January 31, 1874, this agent wrote the Commissioner of Indian Affairs in part as follows:

> The Seminoles are beginning to feel that they are capable of managing their financial affairs without the aid of an agent, and hence the demand to have the whole of their annuity paid into their treasury. On account of their urgency I may have concurred in this demand, and recommended that their request be complied with, while at the same time I was fully convinced that they are not capable of managing their affairs to the best advantage; yet I believed, and still believe that they would be advised by me in matters of importance; and that, by allowing them to have the control of, say half their annuity, as recommended in my communication of the 1st inst., they would take a pride in making improvements, and in adopting a better system of education, and thus they would acquire a better and more practical knowl-

> edge of the management of their financial affairs than they ever could under the present management. But if they refuse to be advised, it would prove a failure, for they have, in common with all Indians, very little idea of the value and uses of money.

This, then, was the information before the Commissioner when he authorized the payments to the tribal treasurer: protests by Captain Baldwin in 1870 that too much was being paid on order of the General Council for the benefits received from the payments, and a recommendation from the succeeding agent that every other payment be made to the treasurer, which was done.

We do not think it can be concluded from this that the Commissioner of Indian Affairs had knowledge of the fact that the General Council was corrupt, venal, and false to its trust. He had reason to believe that the chiefs and lawmakers put too high a value on their services to the nation, that they wanted their own services paid for, even if the other members of the nation needed the money more than they did, and that they were overanxious to render services and run up bills against the nation. Such charges are not infrequently leveled at the law-making bodies and public officials of the white man; but they do not amount to charges of corruption, venality, and fraudulent breach of trust.

Nor can we say that the Commissioner permitted these chiefs and lawmakers to run riot with the tribal funds. He may have allowed them too great a share of them, but what he did allow was that recommended by his agent on the ground, and there is nothing to show that this agent did not act in good faith.

It is hard to believe that the Commissioner of Indian Affairs and the Secretary of the Interior would have made to Congress the recommendation they did on January 9, 1874, if they had believed the General Council was corrupt. On that date, on the recommendation of the Commissioner of Indian Affairs, the Secretary of the Interior wrote the Speaker of the House in part as follows:

> The Seminoles are considerably advanced in civilization, and have a national government, and as a nation are desirous of having the whole amount accruing an-

> nually upon the sum invested as above described, or at least a large portion thereof, paid into the national treasury of their nation, to be disposed of under the laws of the nation, for such purposes connected with their civilization and improvement as the national council may deem best.
>
> I have no doubt of the propriety of complying with their wishes, at least to some extent, and I am equally clear that such portion of their annuities as is not paid into the National Treasury should be expended by the Indian Office, with the sanction of the Secretary of the Interior and the President of the United States, in promoting the general comfort, civilization, and improvement of these Seminoles. In this connection I deem it my duty to refer to a recommendation contained in my annual report, namely, that all annuities, instead of being paid to Indian tribes per capita, be expended, as here indicated, in promoting their general welfare, civilization, and improvement. The payment of cash to individual Indians has, according to all the experience furnished by the Indian Office, tended to produce debauchery and demoralization, rather than to advance the civilization or improvement of Indian tribes.

On this recommendation Congress passed the Act of April 15, 1874 (c. 97, 18 Stat. 29), which expressly authorized the Commissioner of Indian Affairs to pay the annuities "into the treasury of the Seminole Nation to be used as the Council of the same shall provide, instead of paying the same per capita according to the terms of said treaty."

We cannot believe any such authority would have been granted by Congress if it had reason to believe the Council was corrupt, venal, and false to its trust.

In the foregoing discussion we have not considered the report to the Commissioner of Indian Affairs of John P. C. Shanks, the comments on that report by George A. Ingalls, Indian Agent, Union Agency, nor the report of Special Agent A. B. Meacham, because none of these reports were before the Commissioner when he authorized the payments in question to the tribal treasurer.

Shanks, in his letter of August 9, 1875, paints quite a lurid picture of oppression of the people by the chiefs, but a good deal of doubt as to the bona fides of this report is raised by the statement of Agent Ingalls, who says Shanks asked him

to tell the Seminoles what he had done for them for the purpose of trying to induce them to agree to his employment as attorney for the Five Civilized Tribes.

Of the men charged with oppression by Shanks, and especially criticized by plaintiff in its brief, Ingalls said:

> I have had considerable business relation with John Chupco, Chief, Col. John Jumper, 2d Chief, James Factor, Treasurer, and with all other officers of the Seminole Nation and I have never known either of them to speak falsely or misrepresent matters concerning themselves or others and I believe all of them to be honorable gentlemen.

Meacham in his report of November 20, 1878, also says the chiefs were trying to "gobble" the money belonging to the people; but the Commissioner of Indian Affairs, with these conflicting reports before him, continued from 1874 on to make payments of a part of the annuities to the tribal government, and plaintiff in its petition does not complain thereof.

It is not unreasonable to believe that there were some in the tribe who would have "gobbled" all the money if they could have, but we are not convinced that the Commissioner of Indian Affairs permitted them to do so, nor that he paid to them more than was proper in his honest judgment to be expended by the tribal government.

Next, as to payments made from 1899 to 1907. To show corruption and fraud from 1899 to 1907 plaintiff cites, first, the reports of the Dawes Commission of November 20, 1894, and of November 18, 1895. That Commission was appointed pursuant to section 16 of the Appropriation Act of March 3, 1893 (27 Stat. 612), for the purpose of securing an agreement from the Five Civilized Tribes for the extinguishment of the title of the tribes to lands within the Indian territory so that a State embracing these lands could be created. In its report to the Secretary of the Interior dated November 20, 1894, the Commission said:

> Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought

> necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available.

And in its report of November 18, 1895, it said:

> The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect.

These charges are directed at the five tribes indiscriminately and without making any exception. It would appear, however, that the Commission either did not mean to include the Seminoles in the indictment or that at the time it was unacquainted with conditions in this tribe, because in the part of its annual report for 1899 dealing with the enrollment of citizens of the tribe preparatory to making allotments of land to them it said:

> The Seminoles, as has already been seen, are the fewest in numbers of the Five Tribes, and their government has been free from corruption. The rolls of the tribe, while crude in a measure, were found free from all irregularities of a fraudulent character.

Furthermore: As a result of the reports of the Dawes Commission, Congress, in the Appropriation Act of June 7, 1897 (30 Stat. 62, 84), enacted that all the Five Civilized Tribes should certify all their acts and resolutions to the President of the United States and that these acts should not take effect if disapproved by him or until 30 days after their passage if the President failed to act upon them in the meantime. But when the Commission came to make an agreement with the Seminoles about six months later, on December 16, 1897, they incorporated therein this provision:

> When this agreement is ratified by the Seminole Nation and the United States the same shall serve to repeal all the provisions of the Act of Congress approved June

seventh, eighteen hundred and ninety-seven, in any manner affecting the proceedings of the general council of the Seminole Nation.

This agreement was ratified by Congress on July 1, 1898 (30 Stat. 567). This tribe was evidently exempted from the requirement for Presidential approval of the acts of its General Council for the reason that its General Council was believed to be trustworthy and, hence, did not need Presidential supervision.

Thus it appears that the reports of this Commission, instead of proving that the General Council was corrupt, testify to its fidelity to its trust.

Indeed, plaintiff points to no specific act of the General Council as being corrupt; it confines itself to undertaking to show that the Principal Chief (sometimes called "Governor") and Treasurer were corrupt in their dealings with the people, and that the General Council was dominated by them. To prove this, plaintiff says these men issued scrip to the Indians in advance of the annuities they were due to receive, which were redeemable only in merchandise at one of the two stores run by these two men; that a discount of from 10 to 20 percent was charged, and that the prices charged for the merchandise were from 25 to 50 percent higher than at othe1 stores, and that the Indians were forced to accept this scrip whether or not they wanted it. Plaintiff also charges that the Governor and Treasurer misappropriated $191,294.20 of the tribal funds, and that they acquired from the tribe the Wewoka townsite lots at a fraction of their value. It also complains of the action of Andrew J. Brown, the Treasurer, in the Loyal Seminole Payment matter.

John F. Brown was the Principal Chief, and his brother, Andrew Jackson Brown, was Treasurer. They were half-breeds. The charge that they misappropriated $191,294.20 of tribal funds is supported only by a charge that this money never entered the treasury, which was made by a group of 100 men of the tribe who are said to have met to protest against the agreement of December 16, 1897, negotiated by the Dawes Commission. In the resolutions adopted they said this money never found its way into the treasury and that the only explanation offered therefor by the authorities

was that it was paid to a lawyer who negotiated the 1889 agreement for the sale of some of their lands to the United States, and that they were not given the name of the lawyer nor shown his receipt for the money.

There is nothing in the record to support this charge. There was evidently nothing to it, because with this charge before it Congress ratified the agreement on July 1, 1898, knowing at the time that John F. Brown was still Principal Chief and that A. J. Brown was Treasurer.

Nor is there anything in the record to support the charges made in the Memorial to Congress signed by A. W. Crain, B. F. Bruner, Nero Noble, Geo. Ripley, Alex Harjo, and John Jefferson, in which it is charged, among other things, that a few Indians had amassed large fortunes, and had brought their tribe to poverty. Crain was John F. Brown's brother-in-law, but had been at enmity with him for many years. Whether this had anything to do with the charges, we do not know.

In *Seminole Nation* v. *United States*, 92 C. Cls. 210, we held that plaintiff had not proven that the sale of the Wewoka townsite lots was fraudulent. Certiorari was denied, *Seminole Nation* v. *United States*, 313 U. S. 563.

There is no proof in the record to support the charge of wrongdoing by Andrew Jackson Brown in the Loyal Seminole Payment matter. The only thing reflecting thereon are certain statements in a brief filed by P. L. Soper, Special Assistant United States Attorney, in support of exceptions taken to the confirmation of a report by A. J. Brown, who seems to have been appointed administrator for certain deceased and incompetent persons among the Loyal Seminoles. This, of course, is no proof at all. What action the court took on the exceptions we are not told.

Plaintiff relies principally on the issuance of this scrip, called by the Indians "chokasutka," to show that the tribal officers were mulcting the nation. It charges that a discount was deducted, that the Indians were forced to take the scrip, and that the goods in which it alone was redeemable were sold at exorbitant prices.

The commissioner of this court has found that no discount was charged, but we think the preponderance of the evidence

shows that it was. There is some dispute as to the amount of it, but the greater weight of the evidence shows that it was 10 percent.

There is no proof to show the Indians were required to take this scrip whether or not they wanted it. If they wanted merchandise and did not have the money to pay for it, they could go to one of these stores and get this scrip up to the amount of the next annuity payment to which they were entitled, less the discount charged; but there is no proof whatever that they were forced to do this. They could get it or not as they wished.

There is filed in evidence a photostatic copy of an account book kept by A. J. Brown, the treasurer, showing payments made to members of the tribe. This book is explained by a former employee of the Wewoka Trading Company, Allen W. Crain, and by Mrs. John W. Wilmott, another former employee. At the time these former employees testified both of the Browns were dead. On the account book are listed the names of members of the different bands. In the columns headed "W" and "S" are entered certain figures. These, it is explained, show the amount of chokasutka issued to the individuals at the Wewoka and Sasakwa stores run by the Browns. The figures in the column to the left of the column headed "W" show the cash paid. The first item on page 56, for example, shows $12.00 was paid to "Jennie" in cash and $2.00 issued to her in scrip at the Wewoka store; the next four drew their entire annuity in scrip; the next one drew $8.00 in cash and $6.00 in scrip; the next two drew their entire annuity in cash; the next five drew all their annuity in scrip; the next two in cash; the next one drew $10.00 in cash and $4.00 in scrip; and so on.

It is apparent from this that the Indians were not forced to take their annuity in scrip. They could get either scrip or cash as they wished.

This refutes the statement of Delegate Flynn made on the floor of Congress, whatever probative value it may have, that "This money is paid to Jackson Brown, the treasurer, and the Indians never see a dollar of it, but the Browns issue to the Indians due bills good for so much goods at the Brown

store." It would appear that his statement was more oratorical than accurate.

There is little, if any, credible evidence that exorbitant prices were charged for the merchandise sold. There is in evidence a report, dated February 26, 1912, to the United States Indian Superintendent at Muskogee, Oklahoma, made by a man whose signature is illegible, but who signs himself "probate attorney," which gives a comparison of the prices charged at that time by the Wewoka Trading Company, which did a credit business, and by a man named Varnum, who sold for cash. It relates to a time after the period in question and, of course, is not competent evidence; we refer to it because it is the only definite statement in the record reflecting at all on the charge of exorbitant prices. There is some testimony by several members of the tribe that the Wewoka Trading Company did charge higher prices, but their testimony is so general and vague that it is of no real assistance. The probate attorney's report shows that the prices charged for lard, coffee, and rice were the same. The Wewoka Trading Company charged slightly more for beans. It charged for cornmeal 45 cents against 35 cents; 7 to 8 cents for sugar against 6½ cents; 13½ to 14 cents a pound for salt meat against 10 cents; and $3.00 a cwt., for flour against $2.40 to $2.70.

We have a suspicion that higher prices were charged during the period in question, but there is no competent proof worthy of belief to show that they were exorbitant.

We have, then, the oft-encountered practice of merchants dealing with customers who were ignorant and shiftless, who lived only from day to day, who never laid up a cent but were always in debt. Commissaries of logging camps, mines, factories, etc., have long engaged in the practice followed here. These even paid off their workers in scrip. The tenant farmer, as a class, is never out of debt to the landowner or the merchant or the banker, and high rates of interest are charged him. In later years the laws of the States have done much to correct the practice, but it was by no means uncommon forty or fifty years ago. The Department of the Interior corrected that practice of these two stores when it was brought to its attention.

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In 1905 Henry C. Lewis, an investigator for the Department of Justice, was sent to Wewoka to make an investigation of this practice. He reported in part as follows:

> When the credit is extended they are given a book containing the due bills and in this book is entered the particular appropriation which is to cover the advance in goods and the amount of advance so given, which of course, is the same amount as is given in due bills, so that when the Indians ask for $50.00 in credit upon a certain appropriation they are debited on the books of the company with fifty dollars, but are given only forty-five dollars in due bills, and consequently, get only that amount in goods. * * *
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> * * * * *
>
> * * * To charge a discount where goods are given on credit is not unusual, but the system under which it is charged by this company is manifestly unfair, for the reason that when the money is received by the Trading Company the Indians may not have traded out all of the due bills which have been given them, or, in other words, all of the credit extended to them. The result is that a discount has been charged on a part, at least, of the amount given out in due bills, goods for which have not been obtained, while as a matter of fact, the Trading Company has the money in its possession representing such part for which goods have not been obtained, the Indians retaining the remaining due bills to be traded out in the future. It would seem that there should be a discount in favor of the Indians instead of the Trading Company. The Indians are at liberty to turn in the remaining due bills, states Mr. Brown, but they never do so, another result of their pitiable ignorance. Indeed, some of them do not even understand what these due bills represent when they receive them. There is in the record the testimony of one girl who stated that she did not know what the due bills were and threw them away. In point of fact, she threw away so much money. It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking

to the breaking up of the system, which can be done by having the appropriations distributed in some other manner.

Upon receipt of this report the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the practice be prohibited. The First Assistant Secretary of the Interior replied on April 26, 1906, in part, as follows:

> You express the opinion that the Department cannot control the manner in which the Wewoka Trading Company transacts its business, but recommend that hereafter, when payments are made to Seminoles, such payments be made direct to the adult citizens and to the guardians of minors, and that during the time such payment is being made no member of said company or any of its agents or employes be allowed to be present.
>
> In this the Department concurs, and such course should be followed hereafter, should no objections appear.
>
> It is not considered advisable, as you suggest, to instruct the U. S. Indian Inspector for the Indian Territory to advise the Wewoka Trading Company "that the Department does not like its method of issuing coupon books and charging discounts, and that the Department would prefer that said business, in so far as the Seminoles are concerned, be transacted in the usual way and discounts and coupon books be not used or considered in the transaction of business of said company with Seminole Indians."

It thus appears that as soon as the Commissioner of Indian Affairs and the Secretary of the Interior had definite knowledge of this practice they put an end to it.

Even though the Commissioner of Indian Affairs had continued to make these payments to the tribal treasurer with knowledge of the fact that the Wewoka Trading Company, which was owned by the Principal Chief and Treasurer, was extending credit to the Indians at this discount, we would not conclude that the payments had been made by the defendant with knowledge of the fact that the tribal officials were mulcting the nation. We are not at all sure the individual Indian would have been better off if the annuities had been paid to him in cash and he had been prohibited from pledging his annuity payments to secure credit. In all probability, as soon as the money was received it would

have been spent for this and for that, leaving him in dire need of credit until the next payment came due. In 1874 the Secretary of the Interior wrote a letter to the Speaker of the House in which he said:

> The payment of cash to individual Indians has, according to all the experience furnished by the Indian Office, tended to produce debauchery and demoralization, rather than to advance the civiliation or improvement of Indian tribes.

During the years in question defendant paid to the tribal treasurer $864,702.58. We cannot say the defendant should pay this money again because the treasurer of the tribe, as a merchant, extended credit to the members of the tribe on the faith of the annuity payments at 10 percent discount, with the defendant's knowledge. But whether or not this is so, it definitely appears that as soon as the defendant acquired knowledge of the practice it no longer paid the per capita payments to the treasurer, but paid them to the Indians direct. In no event could defendant be liable for payments made in the absence of knowledge of the practice.

Of the total amount paid, $622,145.87 was paid the tribal treasurer pursuant to the direction of Congress in section 12 of the Act of March 2, 1889 (25 Stat. 980). Until this Act was repealed by the Act of April 26, 1906 (34 Stat. 137), which abolished the tribal governments, the Commissioner of Indian Affairs had no discretion to do anything other than to pay this money into the tribal treasury. We have no reason to believe that when Congress passed the Act of 1889 it was aware of corruption in the General Council of the tribe or that the tribal officials were mulcting the people.

We are of opinion the plaintiff is not entitled to recover on item 5.

CASE L–208

By an amended petition filed in this court on December 27, 1937, in case L–208, plaintiff seeks to recover the value of 11,550.54 acres of land. It is alleged that under the third article of the treaty of March 21, 1866 (14 Stat. 755), the defendant had conveyed to plaintiff a 200,000-acre tract of land immediately west of the Creek lands, but that when the

boundaries of this tract were surveyed and laid off the amount included therein was 11,550.54 acres short of 200,000 acres, and that this shortage had been allotted to members of the Pottawatomie tribe and patented to white settlers.

The parties agree that the tract between the Bardwell line, which is the eastern boundary of the original Seminole tract, and the Robbins line, which is the western boundary of the tract, contains only 189,648.18 acres; in other words, that the 200,000-acre tract was short 10,351.82 acres. They also agree that this was due to the incorrect location of the Robbins line and that plaintiff is entitled to recover the value of the shortage at the time it was taken by the defendant. They disagree as to the time of the taking.

The defendant says it took the lands at the time it set them apart as a reservation for the Pottawatomies. This was done under the following circumstances:

On February 27, 1867 (15 Stat. 531), the defendant had entered into a treaty with the Pottawatomies, under article I of which it was agreed that a commission representing the United States and a delegation of the Pottawatomies should visit the Indian country "in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that tribe; and upon the survey of its lines and boundaries, and ascertaining of its area, and payment to the United States for the same, as hereinafter mentioned and set forth, the said tract shall be patented to the Pottawatomie nation." Pursuant thereto the Indian country was visited shortly prior to February 24, 1870, and a tract of land was selected which lay immediately west of the Seminole country. Report of this was made to the Secretary of the Interior, who approved the selection on November 9, 1870, in a letter to the Commissioner of Indian Affairs, the last paragraph of which reads as follows:

> I hereby approve the selection made, and give the authority for the removal of the Pottawatomies as recommended by you, with the direction that, until the

western boundary of the Seminole country is surveyed and marked, they will locate so far west of that tribe as not to intrude upon their lands.

Subsequently, Nathaniel Robbins surveyed and marked the western boundary of the Seminole tract. The report of his survey was made on January 5, 1872. It was approved by the Secretary of the Interior on February 5, 1872. Thereafter, the Pottawatomies occupied the lands up to the west of this line, but it does not appear that a patent to the lands was ever issued to the nation as provided for in the treaty.

At the time the Robbins' report was made and approved it was thought that the Robbins' line had been located so as to enclose between it and the Bardwell line a tract of 200,000 acres, but it was discovered that it did not when the defendant made a geological survey of the lands in the years 1895 and 1896, and it then became known that the Pottawatomies may have been settled on part of the Seminole lands.

In the meantime the Pottawatomies, by an agreement ratified by the Act of March 3, 1891 (26 Stat. 989, 1016), had ceded to the United States the lands assigned to them under the treaty of February 27, 1867, *supra*. The agreement and ratifying Act provided for allotments of portions of these lands to the Pottawatomie Indians in severalty and for the opening of the balance to settlement by white settlers. Believing at this time that the 10,351.82 acres, in issue here, belonged to the Pottawatomies, the defendant in 1892 allotted 3,818.21 acres of them to members of this tribe, and from 1895 to 1913 it patented the balance to white settlers. Later the defendant discovered that these lands belonged not to the Pottawatomies but to the Seminoles, but it took no action to cancel the allotments to the Pottawatomie Indians and the patents to white settlers, and none is contemplated; instead defendant admits plaintiff is entitled to recover the value of the lands in this suit.

Under the foregoing facts we are required by the opinions of the Supreme Court in *Creek Nation* v. *United States*, 295 U. S. 103, and 302 U. S. 620, to hold that the defendant exercised ownership over and appropriated to its own use these lands from the date it allotted them to the Pottawatomies in severalty in 1892 and from the dates of the patents to white

settlers, as set out in finding 27. There is no material distinction between the facts in the *Creek* case and in this.

In the *Creek* case the Sac and Fox Indians were inadvertently located on a part of the Creek lands due to an erroneous survey of the boundary between the Creek lands and that of the Sac and Fox. This boundary line was run by one Darling. He placed it east of a line previously run by Bardwell. In 1889 the United States and the Creeks agreed on the Bardwell line as the correct boundary (Act of March 1, 1889, 25 Stat. 757), but nevertheless the Sac and Fox Indians by an agreement ratified on February 13, 1891, ceded to the United States certain lands described by metes and bounds (26 Stat. 749, 750), which either actually included the Creek lands between the Darling and Bardwell lines or was thought to include them, and these lands were allotted to Sac and Fox Indians and patented to white settlers. The Supreme Court held that there had not been a taking in 1873 when the Sac and Fox Indians were erroneously settled on these Creek lands, but that the taking occurred when the lands were disposed of to persons other than Creek Indians pursuant to the agreement ratified by Congress under which the lands were ceded to the United States. This was held to be a taking, since no action was taken to set aside the allotments and the patents upon discovery of the error.

So in the case at bar the settlement of the Pottawatomie Indians on the Seminole lands in 1872 as the result of an erroneous survey did not constitute a taking of these lands. The lands were not taken until the United States disposed of them pursuant to the agreement with the Pottawatomies under which they were ceded to the United States.

Defendant says the *Creek* case is not controlling because in that case Congress by the Act of March 1, 1889 (c. 317, 25 Stat. 757), repudiated the erroneous survey; whereas, Congress expressly adopted this erroneous survey by the Act of March 3, 1891, *supra*. This, however, is a distinction without a difference, because, while Congress first repudiated the erroneous survey in the *Creek* case, it later accepted a cession of lands included within the erroneous survey, as was done in the case at bar. Furthermore, Congress' adoption of the erroneous survey in both cases was done in

ignorance of the fact that they were erroneous. Their adoption in such circumstances could not be a taking, because the intention to take was lacking. In this case, as in the *Creek* case, there was not a taking until the patents were issued and until the failure of Congress to direct their cancellation after it was discovered that they were issued on lands belonging to the Seminoles.

The defendant says that under the authority of *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, the taking occurred when the Pottawatomies were settled on the land in 1872. In that case plaintiff had the right of use and occupancy only; in this case the plaintiff owned the fee in the lands. This right of use and occupancy in the *Shoshone* case was first impaired when the Arapahoes were settled on their lands, over the protest of the Shoshones, and, hence, it was held that their rights in the lands had been taken as of this date. In the case at bar plaintiff does not sue for its loss of use and occupancy while the Pottawatomies occupied the lands as a reservation; it claims the fee and sues because it has been divested of this fee. It is entitled to recover as of the date of the divestiture. This occurred when the lands were disposed of pursuant to the agreement with the Pottawatomies under which the Seminole lands were conveyed to the United States.

If I, through mistake, erect a structure on land my neighbor owns in fee, or otherwise occupy it, I have not taken his land, unless after discovery of the error I refuse to remove from it. On the contrary, if my neighbor has only a lease on the lands he occupies and does not own the title, and I erect a structure on his lands over his protest, then I have taken from him the only interest he has in the lands, the right of use and occupancy, from the date I erected the structure on it. This, it would seem, is the distinction between the *Creek* case and the *Shoshone* case.

At any rate, it would seem clear that the Supreme Court in the *Shoshone* case did not intend to overrule the *Creek* case. Instead, it suggested a comparison between the two cases; it evidently did not think they were in conflict with one another; and at the next term of the court after the *Shoshone* opinion, the opinion in *Creek Nation* v. *United States*, in

295 U. S. 103, was expressly approved and adopted. See *Creek Nation* v. *United States*, 302 U. S. 620.

Since the facts in the *Creek* case and in the case at bar are the same, we hold that this case is ruled by the decisions in the *Creek* case.

There is much conflict in the testimony over the value of these lands from 1892 to 1913. The values testified to by the witnessess range from $3.50 an acre for the uplands to $30.00 an acre. The highest value put on the bottom lands was $50.00 in 1892, and from $75.00 to $100.00 from 1900 to 1910.

There is in the record, however, evidence more reliable than that of the testimony of witnesses as to values forty to fifty years prior to their testimony.

From 1895 to 1900, 1611.12 acres of the 10,351.82 were patented, and from 1901 to 1906, 4,441.32 acres were patented. During the years 1894 to 1901 the Pottawatomie and Absentee Shawnee Indians disposed of 90,447.86 acres, or about 1/6 of their allotments, at prices averaging $5.52 an acre, and the sales at these prices were approved by the Secretary of the Interior. From 1901 to 1906 they disposed of 67,841.82 acres at prices averaging $8.22 an acre, and the sales at these prices were approved by the Secretary of the Interior. This is a weighted average of $7.50 per acre. This seems to us the best evidence of the value of the lands during these two periods. In 1892, 3,818.21 acres were allotted to the Indians. There were no sales of comparable lands in that year, but we assume their value was substantially the same as in the period 1894 to 1901.

Actual sales of large tracts of comparable lands, therefore, establish an average value of about $7.00 per acre throughout the period from 1892 to 1906. Less than 500 acres were disposed of thereafter. We are of opinion from all the testimony that a valuation of $7.00 an acre for all the lands throughout the whole period from 1892 to 1913 is fair and equitable.

It results that the plaintiff is entitled to recover from the defendant for the taking of this tract of land $72,462.74, plus such amount as will produce the present full equivalent of the value of the land if paid contemporaneously with the taking. In determining this amount we have computed in-

terest on the value of the land at the time of the taking at 4 percent per annum, which is the rate the Government in agreements with Indian tribes in the period between the taking and today has agreed to pay on Indian funds in its hands. We have computed interest at this rate from 1899, by which time about one-half of the acreage had been allotted or patented, to date of judgment. This amounts to $130,215.54.

It results that plaintiff is entitled to recover in this suit the total sum of $202,678.28.

GRATUITIES

On the former hearing of case L-51 we found the defendant was indebted to the plaintiff in the sum of $18,388.30, and this was affirmed by the Supreme Court. This figure, added to the amount of the recovery allowed in case L-208, makes a total recovery of $221,066.58. Against this amount defendant first claims an offset of $31,083.79 (finding 30). The plaintiff admitted on the former trial (93 C. Cls. 525) that the defendant was entitled to this offset, and it was allowed by us. We reaffirm that holding.

Defendant's following offsets are claimed under the provisions of the Act of August 12, 1935 (49 Stat. 571, 596), under section 2 of which this court is directed in any suit brought by an Indian tribe against the United States "to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of said tribe or band."

Defendant's first claim under this Act is for the sum of $175,000 which was paid the Creek Nation for lands purchased from it and given to the plaintiff nation in addition to the tract of 200,000 acres which the defendant was obligated to give it under the treaty of 1866.

By the third article of the treaty of March 21, 1866, *supra*, heretofore referred to, it was recited that the defendant had secured from the Creek Nation the westerly half of their lands, and defendant agreed to convey to plaintiff so much of these lands as lay between the lands retained by the Creeks and between the Canadian River on the south, and the north fork of the Canadian River on the north, and a line

drawn on the west at such place as would include 200,000 acres of land. Prior to the time that the boundary line between the Creeks on the east and the Seminoles on the west had been run, the defendant found it desirable to move the Seminoles, who were then refugeeing in Kansas, to their domain. When the boundary line between the Creeks and Seminoles was finally definitely established it was found that through error some of the Seminoles had been settled on a part of the lands retained by the Creeks. In the meantime the Seminoles had made improvements on these lands, and for this reason the defendant wished to avoid moving them from these lands to their own domain. Hence, Congress, by the Act of March 3, 1873 (17 Stat. 626), authorized the Secretary of the Interior to see if he could induce the Creeks to sell to the United States 175,000 acres of the land retained by them, and to give these lands to the Seminole Nation in addition to the 200,000 acres which the defendant was obligated to give them by the treaty of 1866. Pursuant to this authorization the Secretary purchased from the Creek Nation 175,000 acres of land for the sum of $175,000, and these lands were conveyed to the plaintiff tribe in addition to the 200,000 acres. (The actual number of acres conveyed was 177,397.71, due to an erroneous survey.) The defendant claims an offset of this amount under the Act of August 12, 1935, *supra*.

The defendant was under no obligation to grant to the plaintiff tribe more than 200,000 acres. When it discovered its error in locating the Seminoles on Creek lands, it was under the obligation of removing them to their own domain. The erroneous settling of them on the Creek lands created no obligation on its part to secure these lands for them; nor was it legally responsible for the damages incurred by the plaintiff tribe as a result of the acts of its officers and agents in erroneously locating them on the Creek lands. Certainly it incurred no liability on account of the alleged promises of these officers to the plaintiff tribe that they would protect them from loss on account of the improvements they had made on the lands. No officer, of course, has the power to bind the United States, in the absence of congressional authority to do so, and it is not even contended that Congress authorized these officers to make any such promise nor that it directed them

to locate the plaintiff tribe on the Creek lands. Cf. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 494; *United States* v. *North American Co.*, 253 U. S. 330, 333.

Congress, when it enacted the Act of March 3, 1873, *supra*, authorizing the purchase of this additional 175,000 acres of land, was not discharging any legal obligation incurred; its only legal obligation was to give the Seminole Nation the 200,000 acres of land it had promised it, not 375,000 acres. It recognized, however, that an unfortunate error had been made, and in a spirit of generosity, not because it was under the legal duty to do so, it decided to buy the lands and give them to plaintiff. This was a gratuitous act, the cost of which we are required by the Act of March 12, 1935, to offset against any amount due the tribe.

We hold, therefore, that the defendant is entitled to an offset of the amount paid for this additional acreage, to wit, $175,000.00. (See 93 C. Cls. 526).

In our former opinion in this case (reported in 93 C. Cls. 500, 511–515, as amended by our opinion on motion for a new trial, 93 C. Cls. 534–537) we allowed certain offsets, as set out in findings 11 to 19 of that opinion. In its brief on this trial of the case defendant asked that we allow the same offsets. The plaintiff in its brief on this trial does not mention this part of the case, but in its former brief it covered it fully.

In our former opinion we allowed the following items which plaintiff vigorously opposed: "Pay of Indian Agents," "Pay of interpreters," "Pay of miscellaneous employees," "Fuel, light, and water," "Transportation etc. of supplies." After setting out plaintiff's contentions with reference to these items which, in brief, was that these expenditures were required by treaty, we said:

> However persuasive this argument may once have been, this question has heretofore been decided adversely to the plaintiff by the cases of *Blackfeet, et al. Tribes* v. *United States*, 81 C. Cls. 101, 137, and *Shoshone Tribe* v. *United States*, 82 C. Cls. 23, 93. We hold accordingly that the defendant is entitled to these offsets.

We have reviewed our holding on these items [See 93 C. Cls. 529] and have concluded that we were in error.

On August 7, 1856, the United States entered into a treaty with the Creek and Seminole Tribes of Indians (11 Stat. 699), the preamble of which recited that it was desirable that all the treaty stipulations between the parties be incorporated into one comprehensive instrument. In that document there was definitely set out and described the Creek territory and the Seminole territory. In Article XV it was provided, among other things: "* * * all persons not being members of either tribe, found within their limits, shall be considered intruders and be removed from and kept out of the same by the United States agents for said tribes, respectively: (assisted, if necessary, by the military;) * * *." Under Article XVII the United States agent was required to issue a license to anyone to trade with the Creeks and Seminoles and to approve the compensation to be paid by them for the land and timber they should use. Article XVIII provided in part: "The United States shall protect the Creeks and Seminoles from domestic strife, from hostile invasion, and from aggression by other Indians and white persons * * *." Under Article VIII the United States was required to distribute certain sums to the Indians *per capita*. Under Article IX it was required to remove the Seminoles in Florida to the west and to provide them with rations and subsistence during their removal and for 12 months thereafter. Under Article XXI it was required to survey and mark the boundaries of the reservations.

Under Article I of the Treaty of March 21, 1866 (14 Stat. 755), with the Seminoles, the United States agreed: "* * * In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes * * *." Under Article IV the United States agent was required to make a roll of those members of the tribe who had not committed acts of hostility against the Government of the United States in the War between the States so they could be compensated for losses incurred by them as a result of their cooperation with the United States Government. Under Article VII the United States under-

took to take a census of the tribe for the purpose of electing delegates to a general council of all the tribes in the Indian territory.

The plaintiff says that maintenance of an agency was for the purpose of fulfilling these treaty obligations. It seems to us this necessarily must be so, in part at least. No doubt this agent did for this tribe a great many things not required by treaty, but undoubtedly a considerable part of his time was devoted to fulfilling the obligations the United States had assumed in the treaties of 1856 and 1866, in consideration for which the United States reaped large benefits.

The proof shows, and indeed it is common knowledge, that white people were constantly encroaching on the Indian lands and that Indian traders were constantly imposing upon and defrauding the Indians, necessitating revocation of licenses and careful investigations before issuing others. Protection of the Indians against these two things was enough to keep an agent and many employees busy all their time.

What part of their time was devoted to fulfilling treaty obligations, what part of the interpreters' time or the miscellaneous employees' time was consumed therein, what part of the expenses of the agency was thus incurred, the proof does not show. In the absence of such proof we can allow no part of these items as gratuities.

The item of "fuel, light, and water," we presume, was in connection with the agency, but we do not know. At any rate, it is not shown to have been a gratuity. Nor is it shown that the "transportation of supplies" was a gratuity. This expense may have been incurred in connection with the removal of the Florida Seminoles to the west, or it may have been for the transportation of agency supplies. What it was incurred for we are not shown.

In our former opinion we allowed these items as gratuities on the authority of *Blackfeet* v. *United States*, 81 C. Cls. 101, and *Shoshone Tribe* v. *United States*, 82 C. Cls. 23. It appears, however, that the plaintiff did not contend in the *Blackfeet case* that the defendant incurred these expenses in the performance of a treaty obligation, but only that they were strictly governmental expenditures and that the tribes did not receive any benefit from the expenditures, or if

so, to what extent. Only this contention was considered in our opinion. See 81 C. Cls. 137, 138. The same is true in the *Shoshone* case. See 82 C. Cls. 93, 94. These cases are not authority, as we had supposed, on the question raised by plaintiff in this case.

These items, or some of them, are met with in findings 11, 12, 13, 14, 15, 17, and 18 of our former opinion, and in findings 32, 33, 34, 35, 36, and 38 of this opinion. They cannot be allowed as gratuities in the absence of the necessary proof.

The defendant admitted on oral argument that agency expenses were not gratuities, although it had previously claimed that they were.

The second class of gratuities to which plaintiff raises particular objection are expenses incurred in connection with the allotment of the tribal lands to the individual Indians in severalty. Such items are found in finding 34 as follows: appraising, enrolling, general office expenses, preservation of records, probate expenses, protecting property interests, sale of townsites, surveying, surveying and allotting, traveling expenses.

These expenses, or some of them, were incurred in carrying out the Seminole Agreement ratified by the Act of July 1, 1898 (30 Stat. 567), and the Supplemental Seminole Agreement ratified by the Act of June 2, 1900 (31 Stat. 250), under which tribal ownership of the lands was abolished and the lands were allotted to the Indians in severalty.

These agreements superseded the treaties of 1856 and 1866. Article IV of the former treaty provided that no portion of the land conveyed to the tribe by that treaty "shall ever be embraced or included within, or annexed to, any Territory or State, nor shall * * * ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same." That same treaty in article XV provided that the "Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; * * *."

However, by 1893 white people had crowded into this Indian Reservation in such numbers that they far outnum-

bered the Indians, and so it became desirable, if not imperative, to abolish the tribal governments in this territory and to bring it under the dominion of the laws of the United States. In view of this situation, Congress, on March 3, 1893, passed an act (27 Stat. 645) appointing a commission to enter into negotiations with the tribes—

> * * * for the purpose of the extinguishment of the national or tribal title to any lands within that Territory * * * either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, * * * with a view to such and [an] adjustment * * * as may * * * be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

The act directed the commissioners to undertake to secure an agreement from the Indian tribes permitting an allotment of the lands in severalty, upon the accomplishment of which they were directed to "cause the lands of any such nation or tribe or band to be surveyed, and the proper allotment to be designated."

This commission was known as the Dawes Commission. It entered into negotiations with the several tribes to accomplish the purposes of the Act, but found all of them quite reluctant to accede to the wishes of Congress. Such agreements, however, were finally secured after several years of dickering. That with the Seminoles was entered into in 1897 and was ratified by Congress on July 1, 1898. It provided in part: "that all lands belonging to the Seminole tribe of Indians * * * shall be divided among the members of the tribe so that each shall have an equal share thereof in value * * *. Such allotment shall be made under the direction and supervision of the commission to the Five Civilized Tribes in connection with the representative appointed by the tribal government. * * *" This agreement further provided for the exclusion from lands to be allotted of certain coal, mineral, oil, and natural gas lands, etc., for the leasing and sale thereof, and for the payment to the individual members of the tribe of the proceeds thereof, together with such other money as might be in the hands

of the United States belonging to the tribe. These payments were to be made "by a person appointed by the Secretary of the Interior."

It is apparent, therefore, that these agreements were entered into at the behest of the defendant and as the result of much persuasion of the Indians, and that the defendant acquired substantial benefits therefrom, to wit, among others, no doubt, the incorporation into a State of the Union of the Indian lands on which many white people had settled, free from the jurisdiction and laws of the Indians, and had been guaranteed by the treaty of 1856, and subject to the exclusive jurisdiction and laws of the United States and one of its States.

In return for these benefits the United States agreed that the allotments of the lands should be done "under the direction and supervision of the commission to the Five Civilized Tribes in connection with the representative appointed by the tribal government."

Certainly whatever expenses were incurred by the commission in directing and supervising the allotments should be borne by the defendant, because this is a duty it agreed to perform, in return for benefits received. There is no express agreement on its part to bear the expense of doing the actual work of appraising and surveying the lands and of making up rolls of citizens of the tribe entitled to an allotment and the other necessary things preliminary thereto, but we think this agreement is to be implied under all the circumstances. The Indians did not want individual allotments; they were accustomed to and preferred tribal ownership. The Indians wanted their own tribal governments; this had been guaranteed to them in the treaty of 1856; they did not want the government of the white man. The Indians did not want to be incorporated into a State of the Union; it had been expressly promised them that they would not be. The defendant wanted all these things. The Indians acquired as a result of the agreement no land or money or other thing of advantage to which they were not already entitled.

Under such circumstances it would be highly inequitable to charge them with the expense of the metamorphosis, and

we have no idea they understood that they would be. They had a right to assume, we think, that when the defendant agreed that the Dawes Commission should direct and supervise the allotments it intended to agree to bear the expense of making them.

They had knowledge, no doubt, of the act of 1893 under which the commission to the Five Civilized Tribes was created; at least they may be presumed to have known of it. They knew that that Act, in section 15, appropriated the sum of $25,000 for the survey of such lands as might be allotted by the tribes to the individual members thereof. They knew that in section 16 the commission therein created was directed to "cause the lands of any such nation or tribe or band [as should consent to the allotment of their lands to the individual Indians in severalty] to be surveyed and the proper allotment to be designated." Thus they knew that the officers of the United States were directed to designate and survey the allotments and that the United States had appropriated some money to pay the expense of doing some of the work. What was there that could have given them the slightest intimation that the United States intended to charge them with the expense of doing so?

It seems plain that the United States had no such intention, but, on the contrary, intended to pay the expense itself, as it should have done, since the abolition of the tribal governments and the allotments of the lands were things it wanted, not what the Indians desired or had requested.

A total of several millions of dollars was appropriated to pay the salary and expenses of the commission to the Five Civilized Tribes,[2] and there is not a suggestion in any one of the appropriation acts that the sums appropriated should be charged to the account of the Indians.

We are of the opinion the defendant intended to pay these expenses itself and that the Indians so understood when they

[2] Acts of Mar. 3, 1893, 27 Stat. 646; Mar. 2, 1895, 28 Stat. 939; June 10, 1896, 29 Stat. 339; June 7, 1897, 30 Stat. 83; July 1, 1898, 30 Stat. 591; Mar. 1, 1899, 30 Stat. 939; May 31, 1900, 31 Stat. 236; Mar. 3, 1901, 31 Stat. 1073, 1074; May 27, 1902, 32 Stat. 258, 259; Mar. 3, 1903, 32 Stat. 994; Feb. 18, 1904, 33 Stat. 34; Apr. 21, 1904, 33 Stat. 205; Mar. 3, 1905, 33 Stat. 1060; Mar. 3, 1905, 33 Stat. 1237; Feb. 27, 1906, 34 Stat. 39; June 21, 1906, 34 Stat. 340; Dec. 19, 1906, 34 Stat. 842; Mar. 1, 1907, 34 Stat. 1026; Apr. 30, 1908, 35 Stat. 91; Mar. 3, 1909, 35 Stat. 804.

signed the Seminole Agreement ratified July 1, 1898, and the Supplemental Agreement ratified June 2, 1900.

In our former opinion [93 C. Cls. 532] we allowed these expenses as gratuities on the authority of *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 366, 371. However, we then overlooked the fact that the agreement under construction in that case had specifically provided that the United States should bear certain expenses incident to the breaking up of tribal ownership and that the claim there asserted by plaintiff was to recover other expenses charged to it which had not been assumed by the United States. We held that the specific assumption by the United States of a certain part of the expenses negatived an intention to assume others. In the case at bar the agreement was altogether silent as to who should bear any part of the expenses.

Although the defendant in its briefs requested the allowance as gratuities of expenses incident to allotments, it admitted on oral argument that it was not entitled to them.

There may be some doubt that some of the items in finding 34, which we have been discussing, were connected with the change from tribal to individual ownership; the indications are that all of them were; but, at any rate, the defendant has not shown that they were gratuities, and the burden is on it to do so.

In finding 17 of our former opinion (finding 38 of this opinion) appears an item of office expense, $135,219.60. The defendant admits that a part of this was incurred by the Dawes Commission in negotiating agreements with the tribes. It admits in its brief in the Supreme Court that so much of this item should not be charged as a gratuity. How much, if any, should be so charged the defendant does not show us and, hence, the entire item must be disallowed, whether or not it should be disallowed for the reason set out above.

We have set out in finding 39 expenditures made for the joint benefit of the Creek, Seminole, Cherokee, Chickasaw and Choctaw Nations, but we have not determined what part of them were made gratuitously, because the gratuities set out in the preceding findings exceed the amount the plaintiff is entitled to recover.

Except for the foregoing, our former findings and opin-

ion with reference to the expenditures listed in findings 11, 12, 13, 14, 15, 16, 17, 18, and 19 of our former opinion, as modified by findings 32, 33, 34, 35 36, 37, 38, and 39 of this opinion, are adopted and reaffirmed.

It results that defendant is entitled to offset against the amount due plaintiff under this opinion the following items:

Finding 30	$31, 083. 79
Finding 31	175, 000. 00
Finding 32	7, 936. 37
Finding 33	5, 910. 69
Finding 34	1, 529. 54
Findings 35, 36, and 37	0. 00
Finding 38	108. 81
Total	221, 569. 20

The amount which we have found plaintiff is entitled to recover is $221,066.58. Since the amounts spent by the defendant gratuitously for plaintiff's benefit exceed the amount plaintiff is entitled to recover, plaintiff's petitions will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, (retired), recalled, concur.

WHALEY, *Chief Justice*, concurring in part and dissenting in part:

I concur in the result in Case No. L–51.

I dissent to the majority opinion in Case No. L–208.

In my judgment the lands were taken from the Seminole Nation when [1867] the Pottawatomies were placed thereon under the terms of a treaty made with them, 15 Stat. 531, and not when [1891] the lands were surveyed and alloted after the Pottawatomies had ceded the lands back to the defendant. 26 Stat. 989, 1016. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

I cannot find anything to justify the price of seven dollars an acre for unimproved western lands in the early nineties, especially so when the Government was selling parcels of this same tract to white settlers for one dollar and twenty-five cents per acre. The prices obtained by allottees and settlers

upon resale were for the land after improvement. The value of improved lands should not establish the standard of value of unimproved lands.

OCCIDENTAL LIFE INSURANCE COMPANY, A CALIFORNIA CORPORATION v. THE UNITED STATES

[No. 45402. Decided December 4, 1944. Plaintiff's motion for new trial overruled March 5, 1945]

On the Proofs

Stamp tax; sale of real estate owned by insurance company; deposit with Insurance Commissioner.—Assessment of documentary stamp tax on full value of real estate was warranted where one insurance company, by warranty deed, acquired all the assets of another insurance company, although the vendor had the real estate on deposit with State Commissioner of Insurance to secure the payment of its outstanding policies. Section 725 of the Revenue Act of 1932; 47 Stat. 169, 275.

Same.—A lien or encumbrance which does not affect the consideration or the value of the property conveyed should not be used to reduce the amount of documentary stamps to be affixed.

The Reporter's statement of the case:

Mr. Llewellyn A. Luce for the plaintiff.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.,* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the stipulation and the evidence:

1. Plaintiff, hereinafter called "Occidental Life," is a corporation organized and existing under the laws of the State of California, duly authorized to conduct a life insurance business and maintaining its home office at Los Angeles, California.

2. Guaranty Life Insurance Company, hereinafter called "Guaranty," was an Iowa corporation duly authorized to conduct a life insurance business, which maintained its home

office at Davenport, Iowa. Its total outstanding capital stock at all times material hereto consisted of 2,000 shares.

3. Under date of August 17, 1937, Occidental Life entered into a written agreement with L. J. Dougherty of Davenport, Iowa, acting for himself and other owners of the capital stock of Guaranty, under the terms of which Occidental Life agreed to purchase not less than 1,800 shares of the stock of Guaranty for $375 per share, on and subject to terms and conditions set forth in the agreement. It was agreed that if any or all of the remaining 200 shares of the stock of Guaranty subsequently could be delivered to Occidental Life they were to be accepted and paid for at the same price per share. With respect, however, to the price which might ultimately be paid for the stock of Guaranty, the agreement contained the following provision:

> 2. If, within five (5) years from the effective date of this agreement real estate loans now owned by the Company are liquidated in the usual course of business without loss, and real estate now owned by the Company, or hereafter acquired by Occidental by reason of foreclosure of any of said real estate mortgage loans, is, within said period, sold without loss for the aggregate amount at which said real estate is now carried on the books of the Company, plus additions as hereinafter provided, the Occidental shall pay to Vendor an addition One Hundred ($100.00) Dollars, plus interest at three percent (3%) per annum from the effective date hereof, computed semiannually, for each share of stock purchased by and delivered to it under the terms of this agreement, subject to the terms, conditions and limitations hereinafter set forth.

The agreement contemplated and provided for the taking over of the insurance business conducted by Guaranty, for the reinsurance of the company's outstanding business, and the taking over of all of its assets and for the assumption of its various liabilities and contractual obligations.

4. Also under date of August 17, 1937, Occidental Life and Guaranty entered into a written agreement covering the taking over of the business and assets of Guaranty by Occidental Life, the reinsurance of its outstanding business, and the assumption by the former corporation of the various

liabilities and contractual obligation of the latter. Regarding the retirement of Guaranty from active business the agreement provided as follows:

> 5. Upon the consummation of the reinsurance of the business of the Guaranty, as herein provided, the Guaranty shall retire from the business of writing life insurance and shall thereafter be kept alive as a corporation for such period of time, and no longer, as is necessary to fully and effectually carry out the purpose and intent of this agreement.

5. Under date of September 5, 1937, Occidental Life and a corporation known as Occidental Corporation, organized and existing under the laws of California, entered into an arrangement under the terms and provisions of which Occidental Life assigned to Occidental Corporation the right to acquire all of the shares of the capital stock of Guaranty which might be tendered by L. J. Dougherty to Occidental Life under the aforesaid agreement of August 17, 1937, between those parties, one of the introductory recitals to such assignment reading as follows:

> WHEREAS the Life Company was not and is not interested in purchasing said shares of capital stock of the Guaranty Life Insurance Company as an investment and it has at no time intended so to do, but is solely interested in acquiring all of the assets of said Company and reinsuring its policies and contracts of insurance, and its agreement to purchase the outstanding shares of the capital stock of said Guaranty Life Insurance Company was merely a means to that end; * * *.

Occidental Corporation agreed to recognize the agreement between the insurance companies.

6. On November 1, 1937, the various parties discharged their respective obligations under the agreements and the assignment mentioned. On that date L. J. Dougherty, having acquired the authority to deliver the remaining 200 shares of the outstanding capital stock of Guaranty, transferred the entire 2,000 shares thereof to Occidental Corporation, receiving therefor $750,000, including the sum of $100,000, which had been deposited in escrow upon the execution of the agreement between Dougherty and Occidental Life. The

money paid to Dougherty by Occidental Corporation was furnished by Occidental Life under the provisions of the assignment heretofore mentioned. Occidental Life took possession of all assets of Guaranty, and during the months of November and December 1937, Guaranty executed and delivered to Occidental Life deeds to the real estate hereinafter mentioned.

7. The real estate conveyed by Guaranty to Occidental Life was on deposit with the Commissioner of Insurance of the State of Iowa pursuant to the provisions of certain statutes of Iowa which require that an insurance company must deposit with that official an amount equal to the net cash value of the policies outstanding. The Iowa statutes specify the kind of property which is eligible for deposit and includes real estate acquired by the insurance company through the foreclosure of any real-estate mortgage on deposit with the Commissioner of Insurance. The real estate is deposited with the Commissioner by the insurance company by delivering to him a recorded warranty deed conveying the real estate to him for the purpose of deposit.

8. To transfer the right, title, and interest of Guaranty in and to each tract of real estate on deposit with the Commissioner of Insurance of the State of Iowa, Guaranty executed and delivered to Occidental Life a warranty deed to each tract. Each deed contained the following:

> The aforesaid real estate is now on deposit with the Commissioner of Insurance of the State of Iowa, as authorized by Section 8737 of the Code of Iowa, 1935, and Grantee hereof, its successors and assigns, is hereby designated as the person to whom the aforesaid real estate is to be reconveyed by said Commissioner when and if such deposit is released.
>
> And Grantor hereby covenants with the said Occidental Life Insurance Company, its successors and assigns, that, except as above stated, it holds said premises by good title; that it has good right and lawful authority to sell and convey the same; that said premises are free and clear of all liens and encumbrances whatsoever, and that it will warrant and defend the said premises against the lawful claims of all persons whomsoever.

In all other respects the form of deed used was the customary form of warranty deed.

9. Documentary stamps were not attached to the deeds from Guaranty to Occidental Life at the time of the execution thereof. Following inquiry and direction by the Bureau of Internal Revenue, however, such stamps in the amount of $2,732 were purchased by plaintiff, and were affixed to the deeds and cancelled on November 30, 1937, December 2, 1937, and December 6, 1937. The amount of the stamps was computed on the basis of the actual cash value of the real estate conveyed. The real estate had been accepted for deposit by the Commissioner of Insurance in a total amount less than the foregoing actual cash value as shown by Exhibit A attached to the petition.

10. On November 18, 1938, the plaintiff duly filed with the Collector of Internal Revenue, at Des Moines, Iowa, a claim for the redemption of the documentary stamps in the amount of $2,732 and for refund of $2,732, plus interest as required by law. At the time of the presentation and filing of that claim by the plaintiff, the deeds to which the stamps were affixed were duly presented to the Collector of Internal Revenue at Des Moines, Iowa, or his duly authorized representative who noted and wrote on the face of the stamps that the claim for refund was being filed.

11. On March 13, 1939, the Commissioner of Internal Revenue rejected the plaintiff's claim for redemption of the documentary stamps by letter sent to the plaintiff by registered mail.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The Guaranty Life Insurance Company of Iowa was engaged in the insurance business in that state. Under the laws of Iowa it had deposited with the Commissioner of Insurance of the State of Iowa real estate owned by it to secure the payment of its outstanding policies. A recorded warranty deed conveying the real estate was delivered to the Commissioner of Insurance.

In August 1937 the plaintiff entered into an agreement with one of the stockholders of Guaranty, who was acting for himself and other owners of Guaranty stock, to purchase the

entire stock of Guaranty. The agreement contemplated that plaintiff would take over the insurance business theretofore conducted by Guaranty, take over its assets, and assume its liabilities and contractual obligations. Plaintiff was really buying out the business with all the assets of Guaranty and assuming its liabilities. Guaranty was to go out of business after the purpose of the agreement had been carried out. Plaintiff furnished the cash with which the stock of Guaranty was purchased by another corporation after the plaintiff had assigned its right to acquire the stock to that corporation. These agreements were all carried out and the parties discharged their obligations on November 1, 1937.

All the stock of Guaranty was transferred to the Occidental Corporation and the Occidental Corporation received $750,000 which had been furnished by plaintiff for the purpose of paying for this stock. At the same time plaintiff took possession of all the assets of Guaranty and during November and December, 1937, the deeds to Guaranty's real estate were executed and delivered to plaintiff.

At that time the real estate which was conveyed to plaintiff was on deposit with the Commissioner of Insurance of the state of Iowa to protect payment of its outstanding policies. Plaintiff did not have Federal documentary stamps affixed to these deeds conveying the real estate but the Commissioner of Internal Revenue required plaintiff to acquire and affix stamps to the deeds.

The facts in the case are not in dispute and the real question presented is whether the Commissioner of Internal Revenue properly required plaintiff to affix Federal documentary stamps to the deeds of conveyance from Guaranty to plaintiff.

The controlling statute is Section 725 of the Revenue Act of 1932 which amended Schedule A of Title VIII of the Revenue Act of 1926. This section reads as follows:

> Sec. 725. Stamp tax on conveyances.
>
> Schedule A of Title VIII of the Revenue Act of 1926 is amended by adding at the end thereof a new subdivision to read as follows:
>
> "8. Conveyances: Deed, instrument, or writing, delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1934

(unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt" (47 Stat. 169, 275).

The limitation named in this section was extended by subsequent revenue acts and is applicable to the period under consideration in this suit.

The foregoing statute is very broad and apparently was intended to cover the various kinds of instruments where, upon a sale, an interest in realty is conveyed from one person to another. Plaintiff's principal argument is that Guaranty did not have legal title to the lands in question because these lands were on deposit with the Iowa Commissioner of Insurance and, therefore, could not convey legal title to plaintiff. Accordingly, it argues that the statute is inapplicable. In other words, it contends that unless complete legal title is conveyed in a sale, it is not necessary to attach Federal documentary stamps to the deed which conveys whatever interest the seller has to the purchaser. There is no limitation which provides for such a narrow interpretation of this broad revenue statute.

Plaintiff desired and obtained the same valuable interest in the realty which Guaranty had at that time and that realty was conveyed by deeds executed and delivered by Guaranty to plaintiff. The only qualification in those deeds was that the real estate was on deposit with the Commissioner of Insurance.

Plaintiff held the legal title and the Commissioner of Insurance had only a title securing the payment of the policies which had been issued. When the policies were redeemed then the Commissioner would have to convey what title he had to the holder of the legal title and the plaintiff was that party. The title of the Commissioner of Insurance was sub-

ject to be divested or diminished by the redemption in whole, or in part, of the outstanding policies, but the plaintiff, being the holder of the legal title, could not be divested except by an act of its own, such as a failure to comply with the terms of the policies insured.

The purpose of the Act was to raise revenue.

In *Central Life Assurance Society* v. *Birmingham, Collector*, 48 Fed. Supp. 863, the District Court for the Southern District of Iowa held that the delivery of securities to the Commissioner of Insurance of Iowa constituted a deposit only to be held by him as custodian and did not transfer legal title. This decision was affirmed by the Circuit Court of Appeals, Eighth Circuit, March 8, 1944. No case involving realty under the Iowa laws has been called to our attention. By deed Guaranty conveyed a valuable interest in the property to plaintiff. The "value of the interest or property conveyed" came within the limits fixed by the statute. The conveyances were accordingly properly subjected to a stamp tax by the Commissioner.

A further contention is made by plaintiff that in any event a lien or encumbrance on this property existed by reason of the property having been deposited with the Commissioner of Insurance to the extent of the value for which each tract was accepted for deposit, and that, accordingly, the only amount which should be subjected to the tax is the value in excess of the amount for which the property was accepted for deposit. There is no merit in this contention.

The regulations of the Commissioner provide that—

> In calculating the amount of stamps which must be affixed to a deed of conveyance, the tax is computed upon the full consideration for the transfer less all encumbrances, which rest on the property before the sale and are not removed by the sale. (Article 77, Regulations 71, 1932 Edition.)

This regulation is consistent with the statute above wherein it provides that the amount of tax to be fixed is based upon "the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale." To obtain the con-

sideration or net value of the property conveyed would require taking into consideration liens or encumbrances on the property at the date of acquisition, such as a trust or mortgage.

Here we do not have anything in the nature of a lien or encumbrance of the type ordinarily thought of within the meaning of those items. The property was merely on deposit with the Commissioner of Insurance and was used at its full value for the protection of Guaranty's insurance policies. There is no suggestion that plaintiff paid any less for this property by reason of the fact that it was on deposit when the acquisition was made. It was apparently acquired and used by plaintiff for the same purpose as it had been used by Guaranty and that at its full value. Obviously a lien or encumbrance which does not affect the consideration or value of the property conveyed should not be used to reduce the amount of documentary stamps to be affixed.

The petition is dismissed. It is so ordered.

Littleton, *Judge;* and Booth, *Chief Justice* (retired) recalled, concur.

Madden, *Judge*, dissenting:

I agree with the opinion of the court that the deeds from Guaranty to the plaintiff were taxable conveyances. I think it is not necessary to decide, and I would not decide, whether the "legal title" to the lands was in Guaranty, or in the Commissioner of Insurance, after the deeds were made to him. I think, however, that the interests conveyed by Guaranty to the plaintiff were subject to incumbrances, the amount of which should have been deducted from the unincumbered value of the land, in determining the amount of the applicable stamp tax. Each piece of land was pledged to the Commissioner of Insurance to secure a specified amount of the Guaranty Company's obligation to its policy holders to pay them, upon demand, the cash value of their policies. Suppose a particular piece was pledged to the amount of $1,000. Neither a farmer, nor the plaintiff, would buy and pay the

full value for the land unless the pledge was released, since if the debt to the policy holders was not paid by Guaranty, the purchaser of the land would have to pay $1,000 upon it to keep the land from being sold to satisfy it. The deduction seems to me to be expressly required by the statute, and I would give the plaintiff a judgment for $2,242, with interest.

WHITAKER, *Judge*, concurs in the foregoing opinion.

HERBERT M. GREGORY v. THE UNITED STATES

[No. 45570. Decided December 4, 1944. Plaintiff's motion for new trial overruled March 5, 1945]

On the Proofs

Income tax; mailing notice to "last known address"; suit under special jurisdictional act; tort action for alleged wrongful mailing.—Where plaintiff sues under a special jurisdictional act (55 Stat. 904) to recover damages arising from tax liens filed against his property through the alleged "gross carelessness" of the commissioner of Internal Revenue in denying taxpayer an opportunity to be heard before assessment by the mailing of the 60-day deficiency notice to him at a place which was not his "last known address"; it is *held* that in Section 272 (k) of the Revenue Act of 1928 (45 Stat. 791) Congress had reference to taxpayer's regular or permanent address or residence and that the burden is upon the taxpayer to keep the Commissioner advised of a change of address, especially where, as in the instant case, a temporary address is given in connection with a trip indefinite and uncertain in duration.

Same; mailing of notice was proper.—The mailing of the deficiency notice to taxpayer's last known address in the State in which he had filed his tax return was proper, and plaintiff is not entitled to recover.

Same; special jurisdictional acts to be strictly construed.—Special jurisdictional acts are to be strictly construed and they are not to be construed so as to concede liability on the part of the United States unless the language of the act in that regard is very clear. *Sioux Tribe of Indians* v. *United States*, 97 C. Cls. 613, 663–665 cited.

Same; legislative history of act.—The legislative history of the special jurisdictional act (55 Stat. 904) under which the instant case was brought discloses no intention on the part of the Congress to concede liability.

Same; failure to protest.—Where plaintiff's claim for damages is based on the effect of the tax lien filed on his property on August 13, 1931, and where plaintiff on receipt of the collector's letter of June 27, 1931, knew that he had not received the 60-day deficiency notice of March 11, 1931, and where plaintiff made no protest then nor later when he received the Commissioner's letter of September 24, 1931; it is *held* that plaintiff is not entitled to recover.

Same; injunction.—The remedy of injunction to prevent collection or enforcement of the assessment provided for in a proper case by section 272 (a) of the Revenue Act of 1928 was available to plaintiff for 47 days prior to August 13, 1931, and thereafter, but no effort to invoke that remedy was made.

Same; assessment not void but voidable.—Even if it had been found that the assessment made in May, 1931 had been improper and not in strict accordance with the statute it was not void but voidable. *Lehigh Portland Cement Co.* v. *United States*, 90 C. Cls. 36, 49–51, 60–69.

The Reporter's statement of the case:

Mr. John W. Townsend for plaintiff.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant.

Mr. Robert N. Anderson and *Mr. Fred K. Dyar* were on the brief.

Plaintiff sues under a special jurisdictional act of Congress of May 9, 1941, to recover $31,300 as damages alleged to have been sustained by him as the result of alleged loss of and on certain real and personal property in Los Angeles, California, by reason of tax liens filed against such property August 13, 1931, by the collector at Los Angeles on an additional income tax assessment made by the Commissioner of Internal Revenue May 2, 1931. Plaintiff received notice of assessment on June 6, 1931, but he did not receive the 60-day deficiency notice required to be mailed under section 272 (a), Revenue Act of 1928, for the reason that it was mailed to an address in Arkansas from which it was returned unclaimed. The special act was enacted to enable plaintiff to present to this court his claim for damages, which damages he alleged were directly caused by failure of the Commissioner properly to direct and mail the deficiency notice to plaintiff's correct address.

Plaintiff contends, first, that the special act concedes that the United States is liable for such damage as was sustained, and that the only question before the court is the amount of damages; and, secondly, that if the act does not concede liability the United States is liable under the act in an action sounding in tort due to the "gross carelessness" and negligence of the Commissioner in not mailing the deficiency notice to plaintiff's "last known address" within the meaning of section 272 (k) of the Revenue Act of 1928. He also contends that the assessment was void. While plaintiff does not specifically so allege, it is inferred from his petition and brief that his position is that he was not guilty of any carelessness or negligence in the premises. In his brief he contends that "This official carelessness deprived the petitioner of the right to a hearing before the Board of Tax Appeals; it resulted in an erroneous assessment of the taxes; and it resulted in the placing of a wrongful lien on all of plaintiff's properties, which lien constituted a cloud on the title thereto, effectively precluding the plaintiff from selling the same."

Plaintiff further contends that because the deficiency notice was not properly mailed the tax assessment was barred on May 2, 1931.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. This suit was instituted under an act of Congress approved May 9, 1941, reading as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon, notwithstanding the lapse of time or any provision of law to the contrary, the claim against the United States of Herbert M. Gregory, of El Dorado, Arkansas, for damages alleged to have been sustained by him as a result of the loss of and on certain property owned by him in Los Angeles, California, due to liens filed against such property, in the year 1931, by the collector of internal revenue at Los Angeles, California.

Such suit shall be brought within six months from the date of the enactment of this Act.

Sec. 2. There is hereby authorized to be appropriated such sum as may be necessary to pay the amount of any judgment rendered pursuant to this Act. The amount of such judgment shall be payable by the Secretary of the Treasury upon the presentation of a duly authenticated copy of the judgment of the Court of Claims (55 Stat. 904).

Petition herein was filed October 20, 1941.

2. Prior to 1929 the plaintiff herein, being the same Herbert M. Gregory named in the jurisdictional act, was president of Gregory Bus Lines, Inc., which operated in the States of Arkansas, Mississippi, Missouri, and Tennessee, with principal office at Memphis, Tenn. He held about a two-thirds interest in that company. This interest he sold May 19, 1928, to another concern, Consolidated Utilities, Inc., for cash and stock therein and lost heavily in the transaction. Suit was brought against Consolidated Utilities, Inc., judgment was obtained, but plaintiff was not able to collect thereon. The stock in Consolidated Utilities, Inc., received for stock in Gregory Bus Lines, Inc., was at all times worthless.

3. In seasonable time plaintiff caused to be filed his individual income tax return for the calendar year 1928. Therein was indicated a net taxable profit of $17,290.95 on sale of Gregory Bus Lines, Inc., stock and an income tax of $1,033.34, eventually paid.

The taxpayer's name and address given in this return was "H. M. Gregory, L. C. Gaty, Agt., 205–9 South Second Street, Memphis, Shelby County, Tennessee." The agent signed the return with the statement "Mr. H. M. Gregory is temporarily residing in California and has no records there."

The Memphis address, so given, was that of the office of Gregory Bus Lines, Inc., and the agent of the taxpayer was also the auditor of that line. The return was filed with the collector of internal revenue at Little Rock, Ark., where his previous return had been filed. Prior to the fall of 1928 plaintiff had been a resident of Parkin, in Arkansas.

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4. From California the plaintiff transmitted to the collector of internal revenue at Little Rock, Ark., June 10, 1929, the following message:

> Attached find my check number 42 for $258.34 to cover the 2nd payment on my 1928 income taxes.
>
> Please forward receipt to me here. I would also thank you to change my address from 205 South 2nd Street, Memphis, Tenn., to read 1256 Woodruff Ave., Westwood Hills, Los Angeles, Calif., as I have moved out here. Also could it be arranged for me to pay the future payments here.

The above quoted letter was not furnished to the Commissioner of Internal Revenue.

The collector at Little Rock replied June 18, 1929:

> Reference is made to your letter dated June 10th, 1929, relative to future payments of your 1928 income tax being made in Los Angeles.
>
> As suggested in your letter, I am transferring the balance of your tax to Los Angeles and the quarterly installments for September and December should be made in that District.

The transfer was made accordingly and the balance of the tax was paid to the collector of internal revenue at Los Angeles.

5. Litigation in Tennessee developed in 1930 between the plaintiff and his wife wherein the wife sued for separate maintenance, and in the course of this litigation plaintiff's assets in Tennessee were attached.

Based on the audit report, October 31, 1930, of the internal revenue agent in charge at Nashville, Tenn., of the investigation of plaintiff's 1928 tax return, a copy of which was furnished plaintiff, the Commissioner of Internal Revenue December 11, 1930, gave to plaintiff, in care of the chancery court clerk, as receiver, Memphis, Tenn., notice of a jeopardy assessment for the taxable year against plaintiff of additional income tax amounting to $13,973.61, under section 274 of the revenue act of 1928, and in this notice quoted section 274 (a) of the act having relation to immediate assessments in case of receivership proceedings. The chancery court clerk was the receiver in the proceedings between plaintiff and his wife. This notice was delivered to plaintiff.

The notice stated that request for reconsideration might be submitted by plaintiff within thirty days from December 11, 1930. The assessment was in the main based upon the value put upon the stock of Consolidated Utilities, Inc., by the Internal Revenue Agent in Charge at Nashville, Tenn., in a report of his investigation and audit to the Commissioner. Plaintiff objected to the assessment and on December 29, 1930 wrote the Commissioner from 2645 Oakview Terrace, Maplewood, Mo., asking for a hearing at Memphis, Tenn., as follows: "I respectfully ask that you instruct your representative at Memphis, Tenn., to set this my petition for hearing to be held at that place at early date that I can appear before him in person and that I be given the opportunity to prove that my contentions in this matter are correct and that my report for the year 1928, as made by me is correct."

The receipt of this letter was acknowledged in a letter to plaintiff at the above-mentioned address, and on January 19, 1931, the plaintiff, then at the Marion Hotel, Little Rock, Ark., wrote the Commissioner of Internal Revenue on the stationery of the Marion Hotel as follows:

HOTEL MARION,
LITTLE ROCK, ARK., *Jan'y 19th, 1931.*

Mr. P. H. SHERWOOD,
Chief of Section, Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: This will acknowledge receipt of your letter of Jan'y 15th, your file IT; AR–E–I, IT, addressed to me at 2645 Oakview Terrace, Maplewood, Mo., forwarded to me here.

I am leaving today for Los Angeles, Calif., where I expect to remain for several months. My address there will be 2014 Glendon Ave., Westwood Hills, Los Angeles, Calif.

So please advise me there as to when my petition for a hearing will be had, and I wish to handle the matter there if it is possible.

There is no merit to this claim, as a matter of fact I am preparing to file a claim for refund of a part of the tax I have already paid account of 1928, as I now find that I paid more than I should have."

(Sgd.) H. M. GREGORY.

January 26, 1931, the Commissioner by J. C. Wilmer, Deputy Commissioner, H. B. Robinson, Head of Division, refused to grant plaintiff a hearing in California (which was obviously impracticable under the circumstances), and wrote plaintiff a letter addressed to 2014 Glendon Ave., Westwood Hills, Los Angeles, Calif., as follows:

> Further reference is made to your letters dated December 29, 1930 and January 19, 1931 relative to your income tax liability for the year 1928.
>
> With reference to your request that the matter in question be referred to the internal revenue agent in charge at Los Angeles, California, you are advised that it is impracticable to grant a conference in California.
>
> The matter has been referred to the internal revenue agent in charge at Nashville, Tennessee, and that official will take such steps as are necessary to determine the facts concerning the correct tax liability.
>
> Any further data in regard to the matter should be submitted to the internal revenue agent in charge, 315 Customhouse, Nashville, Tennessee.
>
> Upon receipt of the report of the agent in charge, this office will consider the recommendation and you will be advised in regard to the decision reached.

A letter to the same effect was written by the Commissioner to the Internal Revenue Agent in charge at Nashville, Tenn., about the matter.

The "Marion Hotel, Little Rock, Arkansas" was the only address of plaintiff in Arkansas which the Commissioner had in connection with the 1928 return.

The jeopardy assessment of $13,973.61 was eliminated by the Commissioner of Internal Revenue March 3, 1931, by notice to that effect to the plaintiff, care of the receiver at Memphis, for the reason that the receiver had not been appointed to take over all of plaintiff's property.

6. On May 2, 1931, on assessment list May 03, page No. 5, 1928, taxes in the amount of $13,973.61 and interest of $1,848.73, a total assessment of $15,822.34, were assessed by the Commissioner of Internal Revenue against plaintiff to the collector of internal revenue at Little Rock, Ark.

7. On June 6, 1931, there was received by plaintiff from the collector notice of an assessment against him of $15,822.34, principal of $13,973.61 and interest to May 29, 1931, of

$1,848.73, additional 1928 income tax, and demand for immediate payment, remittance to be made to the collector of internal revenue at Little Rock, Ark. This notice and demand was on form 7658 and was addressed to the plaintiff in care of Wilfred Jones, Missouri Bldg., Clayton, Mo.

Writing from 5622 Etzel Ave., St. Louis, Mo., the plaintiff protested to the collector of internal revenue at Little Rock against the assessment referred to, and that collector advised the plaintiff June 27, 1931, as follows:

> Reference is made to your letter of June 22nd concerning my notice in which demand was made for the payment of $15,822.34, additional income tax for the year 1928.
>
> In connection with this demand you refer to having requested the Collector at Nashville, Tennessee, to grant you a hearing before this assessment of tax was made. You state you are in a position to prove that you do not owe this amount.
>
> For your information this amount of tax was previously assessed against you and certified to me for collection and, after having made several attempts to locate you, the assessment was withdrawn by the Commissioner presumably on information he had received that you had not been given the time provided by law in which to file a protest against the tax being assessed.
>
> Now the Commissioner has certified to me this tax for collection and the list carries a notation that a 60-day letter was mailed to you March 11, 1931, the assessment being made May 29, 1931, therefore you were given the 60 days allowed under the law in which to present your case. Evidently you did not present to the Commissioner, within the time allowed, any information that changed the tax determination.
>
> Under the existing procedure your only recourse would be in the payment of the tax and then you could reopen the case by filing a claim for refund. Within the next few days I will transmit this collection to the Collector at St. Louis and you may take up with him the payment of this tax.

8. The sixty-day deficiency letter of March 11, 1931, referred to in the letter of the collector at Little Rock, June 27, 1931, had been sent by the Commissioner by registered mail addressed to the plaintiff in care of Marion Hotel, Little Rock, Ark., and returned to the office of the Commissioner of

Internal Revenue in Washington, D. C., as unclaimed. It was never re-mailed.

Since 1910 plaintiff has lived at the Marion Hotel whenever he was in Little Rock, and it appears that after the fall of 1928 he made that hotel his residence when he was in Arkansas. The Marion Hotel was the address where plaintiff could always be found when he was in Little Rock, Ark. Plaintiff never left forwarding addresses when he went or moved from place to place.

Plaintiff sold his interest in the Gregory Bus Lines, Inc., May 19, 1928, and in the fall of 1928, temporarily moved or went with his wife to Los Angeles, Calif. While there he requested the auditor of the Gregory Bus Lines in Memphis, Tenn., to make up his 1928 tax return (see finding 3). Plaintiff had always lived in Arkansas and until 1928 he had a residence at Parkin, Arkansas, but in none of his correspondence with the Government officials did he give or mention this place as his address, or residence.

The tax rolls of Los Angeles County, California, show Hotel Marion, Little Rock, Ark., as the address of plaintiff in 1930 and 1931.

In his correspondence with the collector of internal revenue and the Commissioner of Internal Revenue plaintiff wrote from various places, and his letters so indicated. Among such places was the Marion Hotel at Little Rock, Ark. He did not request that correspondence from the defendant on tax matters be mailed to him at the Marion Hotel, Little Rock, Ark. There is no direct explanation in the record as to why the Marion Hotel at Little Rock, Ark., was selected as the address to which to mail the sixty-day deficiency letter. However, that was the only address and the last known address of plaintiff in Arkansas which the Commissioner had.

The defendant's officers in their transactions with the plaintiff have treated the mailing of this letter as complying with section 272 (a) of the Revenue Act of 1928, 45 Stat. 791, 852.

9. The assessment of May 1931 was transferred by the collector at Little Rock, July 3, 1931, to the collector at St. Louis, Missouri. On the collector's tax-transfer voucher, form 514, certifying to the transfer, the address of plaintiff is

given as 443 Roxbury Drive, Beverly Hills, Calif. This voucher indicates by indorsement of the collector at St. Louis that a warrant for distraint was issued July 3, 1931, and that transfer was made for the reason that the taxpayer was located in the First Missouri District.

The plaintiff thereupon protested by letter from 5622 Etzel Ave., St. Louis, Mo., and in person to the collector at St. Louis that the assessment was in error and the tax already overpaid. The account was on July 22, 1931, transferred by the collector at St. Louis, Mo., to the collector at Los Angeles, Calif.

10. The facts and circumstances disclosed by the record do not establish that the Commissioner of Internal Revenue acted carelessly or negligently in mailing the deficiency notice of March 11, 1931, to plaintiff in care of the Marion Hotel, Little Rock, Ark. Prior to, as well as after receiving notice of and demand for the additional assessement on June 6, 1931 (finding 7), as well as the collector's letter of June 27, 1931 (finding 7), plaintiff failed to take proper and legal steps available to him for the purpose of showing that the proposed and assessed tax for 1928 was excessive, or for the purpose of preventing after June 6, 1931, the enforcement of the assessment or the subsequent levying of the lien on August 13, 1931 (finding 11), or in having the lien cancelled when he received notice of it.

11. On August 13, 1931, there was filed in the office of the County Recorder of the County of Los Angeles, State of California, the following notice of tax lien:

July 590034—1931

NOTICE OF TAX LIEN UNDER INTERNAL REVENUE LAWS

44145

No. 29595.

UNITED STATES INTERNAL REVENUE,
6th District of California,
August 12th, 1931.

Pursuant to the provisions of Section 3186 of the Revised Statutes of the United States, as amended by section 613 of the Revenue Act of 1928 (Act of May 29, 1928, 45 Stat., 875), notice is hereby given that there

have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to-wit:
Name of taxpayer, H. M. Gregory.
Residence or place of business, 443 Roxbury Dr., Los Angeles, California.
Nature of tax, Income 1928.
Amount of tax assessed, $15,822.34.
Date of assessment list received, 5–29–31.

GALEN H. WELCH,
Collector.

E.

The plaintiff wrote to the "Collector of Internal Revenue, Washington, D. C.", September 12, 1931, protesting against this lien, stating his inability to pay the tax and thereafter sue for recovery, and asked for a hearing. The Commissioner of Internal Revenue replied to this letter on September 24, 1931, as follows:

Reference is made to your letter dated September 12, 1931, pertaining to your income tax liability for the year 1928. It is stated in effect that the deficiency of $13,973.61 plus interest is erroneous; that upon your request for a hearing prior to the assessment of the deficiency you were informed that the matter would be investigated and that you would be later advised.

It is further stated that you were never afforded a hearing and that a lien has been placed on your home—your only property, and that you are not financially able to pay the deficiency. You request a hearing in the matter with the view of lifting the lien.

The matter of your tax liability was made the subject of a field investigation, the findings of which are embodied in a revenue agent's report dated October 8, 1930. A copy of the record which embodied the adjustments and explanations thereof resulting in the deficiency was furnished you on October 31, 1930. You were advised by Bureau letter of December 11, 1930 that the agent's report had been reviewed and except as to a minor adjustment which was explained had been approved in full. That letter contained notice of the proposed deficiency

together with full explanations of the adjustments resulting therein.

A hearing was requested in your letter from Maplewood, Missouri, dated December 29, 1930. In your letter from Little Rock, Arkansas, dated January 19, 1931, you stated that you were leaving for Los Angeles, California, and asked that the hearing be held there. In reply you were advised by Bureau letter of January 26, 1931 that it was impractical to grant a conference in California; that the matter had been referred back to the Revenue Agent at Nashville, Tennessee, and that any further data which you wished considered should be submitted to that officer, who would give proper consideration thereto; that his recommendation would be considered by the Bureau and that you would be advised of the decision reached.

The agent gave careful consideration to all data at hand, which data, however, were not sufficient to warrant a modification of the tax liability as previously determined. You were accordingly advised by registered letter dated March 11, 1931, which letter embodied notice of the above-mentioned deficiency and also notice of your right to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Section 272 of the Revenue Act of 1928 provides as follows:

"Failure to file petition.—If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Collector."

Therefore, further consideration of the matter by the Bureau can be given only in connection with a claim for refund filed after payment of the tax. With respect to your inability to pay the tax at this time, you are advised that this is a matter to be taken up with the Collector of Internal Revenue for your district.

Plaintiff had not in fact received the registered deficiency notice of March 11, 1931.

On October 2, and again on October 14, 1931, plaintiff acknowledged receipt of the letter of September 24, 1931, recited the history of the case, enlarged upon the facts of the situation, and again requested a hearing. These letters are in evidence as plaintiff's exhibits 24 and 25 and are made a part hereof by reference.

There followed other correspondence and the Commissioner of Internal Revenue, October 23, 1931, promised a further investigation and wrote plaintiff as follows:

> Receipt is acknowledged of your letter dated October 14, 1931, relative to your income tax liability for 1928. A letter dated October 12, 1931, addressed to you by J. F. Gautney [plaintiff's attorney], was enclosed with your letter.
>
> Please be advised that this office has requested additional information relative to your case, as suggested in your letter dated October 2, 1931. Pending receipt of that information, no further action is contemplated with respect to a redetermination of your income tax liability for 1928.
>
> You will be informed subsequently as to the result of consideration of the data which are being assembled.
>
> In accordance with your request, the letter enclosed with your letter is being returned herewith.

12. Plaintiff persisted in his complaints about the situation, emphasizing the effect of the lien upon his financial condition, when on March 29, 1932, the Commissioner of Internal Revenue, after the further investigation and audit mentioned above, certified an overassessment of plaintiff's income tax for the calendar year 1928, resulting in a final net increase in tax of $123.10 only and interest of $16.29, a total of $139.39. This amount has never been paid. The certificate of overassessment was based on a revaluation of stock and notes of Consolidated Utilities, Inc., to nothing.

In the letter of March 29, 1932, the Commissioner advised plaintiff as follows:

> Reference is made to your letter dated March 14, 1932, relative to your income tax liability for the year 1928.
>
> The matter has been carefully considered and it is proposed to adjust your tax liability on the basis that the stock and three non-negotiable notes received from Consolidated Utilities, Inc., and valued at $75,000.00 and $41,250.00, respectively, by the revenue agent and this office, be considered as having had no value. This adjustment will result in a tax liability in addition to that shown on your original return of only $123.10, exclusive of interest instead of a deficiency of $13,973.61 and interest of $1,848.73, the additional amounts assessed and now outstanding against you. * * *

13. On the 16th of January, 1931, pursuant to a separation agreement, plaintiff's wife conveyed to him by quitclaim certain real property situated in Los Angeles, Calif., described as follows: Lot 6, Block 36, Tract 4677, known as 1256 Woodruff Avenue (hereinafter referred to as the "Woodruff" property), and Lot 5, Block 3, Tract 7803, known as 10824 Wellworth Avenue (hereinafter referred to as the "Wellworth" property), the grantee to assume encumbrances and taxes.

The Woodruff property was encumbered by a deed of trust executed for the purpose of securing a note for $7,500, and in July, 1931, made subject also to a second deed of trust securing a note for $2,000, certain personal property in the house being pledged as additional and collateral security for payment of the second note, a total encumbrance of $9,500.

The Wellworth property was subject to a mortgage of record for $5,000 and a trust deed of record for $2,150, a total encumbrance of $7,150, subsequently reduced by plaintiff to $6,000.

14. The Woodruff property consisted of a house and lot. The house was new in the year 1928 and the property was purchased for about $16,250. Plaintiff spent some $3,500 on improvements.

There was a two-car garage on the lot with an apartment over it with a bath. In the house were a reception hall, living room, dining room, kitchen, breakfast room, den, three bedrooms, and three baths. The house was two-story, of Spanish architecture, with floor space of 2,573 square feet.

The house had a concrete foundation, stucco and brick walls, pitched tile roof in front, and the balance of the roof of flat composition with some tile trim on some of the edges. The larger rooms had hardwood floors, the bathrooms tile floors. Living room and dining room had interior stucco walls and painted woodwork. The first floor had an entrance hall with a tile floor, and tile steps led up to the second floor. There was a patio on the lot with an antique well in the center, and the place was landscaped with olive trees and orange trees.

The property was in a high-class residential neighborhood

and not far from the southern branch of the University of California. It was well located with respect to motor transportation and occupied a commanding position in the neighborhood.

On August 13, 1931, it had a fair value of $15,000. Plaintiff's equity therein was $5,500.

15. The Wellworth property was acquired by the plaintiff in the summer of 1929 for $2,150 cash and assumption of first and second trusts of $7,150. Later, the plaintiff reduced the trusts to $6,000. This was a residence and garage, and plaintiff made some improvements, renting the property for $90 a month. This property he traded in the summer of 1931 for a four-flat building in Los Angeles located at 5109 West 21st Street (hereinafter referred to as the "Four-flat" property), subject to a deed of trust for $11,500. This deal did not go through until the tax lien on the Wellworth property had been transferred by the collector of internal revenue to the Four-flat property. This transfer of lien was made September 12, 1931, at plaintiff's request, the collector being satisfied that there was no diminution of security.

The deed conveying the Four-flat property to plaintiff was recorded September 15, 1931. The deed was signed as of August 3, 1931, and was acknowledged September 3, 1931.

The Four-flat building was in a desirable residential district. It had four apartments of five rooms and a breakfast nook each, with fireplace in the living room, wall grate in a bedroom, built-in refrigeration, hardwood floors. The apartments each rented for $50 a month. The building was two-story of stucco construction, with a four-car garage, concrete area and driveway. The roof was tile in front, with the remainder of flat composition. The building was erected in 1929. The expenses of the landlord did not include heating.

Between August 13, 1931, and September 12, 1931, the Four-flat property had a fair value of $20,000, and plaintiff's equity therein amounted to $8,500.

16. At the time the tax lien was imposed August 13, 1931, plaintiff owned a Packard passenger automobile, of a fair market value of $1,095. On this car there was an encumbrance of $500.

17. The Woodruff house was plaintiff's residence and contained his household furnishings. The house was exceptionally well-equipped and expensively furnished with both modern and antique furniture, all in good and carefully kept condition.

On August 13, 1931, the fair market value of the furnishings and household goods was $5,000.

18. By reason of the tax lien filed and recorded by the collector of internal revenue plaintiff was unable to sell any of his real property, the furnishings and household goods of his Woodruff property, or his automobile. He was able to effect the trade of his Wellworth property for the Four-flat property only by reason of the fact that the collector was willing to and did transfer the lien to the Four-flat property.

During the period that the lien was imposed the plaintiff was in financial straits and unable to meet his obligations.

Subsequent to March, 1932, the encumbrances on the Woodruff and Four-flat properties, including the furniture and goods in the Woodruff house, were foreclosed, and plaintiff got nothing in the transactions, losing all his equities.

The automobile was also repossessed by the company financing it, and plaintiff thereby lost his equity in the automobile.

19. The tax lien filed August 13, 1931 (finding 11) was discharged of record by the collector at Los Angeles, July 26, 1938.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff's first claim that the special act of May 9, 1941, concedes liability cannot be sustained. Special jurisdictional acts such as this one are to be strictly construed, and they are never construed to concede liability unless the language of the act in that regard is very clear. *Sioux Tribe of Indians* v. *United States*, 97 C. Cls. 613, 663–665. The reports of the Claims Committees of Congress on the act disclose no intention to concede liability. A bill, S. 1591, was first introduced in the Senate in 1937 to pay plaintiff $23,000 plus interest in settlement of his claim for damages

which he alleged were occasioned by the levying of the tax lien without his having been given a hearing on the matter of his tax liability. This bill was not enacted, but in December 1939 a bill to confer jurisdiction upon this court was introduced in the House which resulted in the enactment of the act quoted in finding 1, on May 9, 1941 (H. R. 4063, 55 Stat., Part 2, 904). The bill as originally introduced and as finally enacted conferred upon this court jurisdiction, notwithstanding the lapse of time or any provision of law to the contrary, to hear, determine and render judgment upon the claim of plaintiff "for damages alleged to have been sustained by him as a result of loss of and on certain property, * * * due to liens filed against such property, in the year 1931, * * *." In submitting his report to Congress on the proposed jurisdictional act, the Secretary of the Treasury stated that "Unless the proposed legislation is enacted, the claim for damages in question would come without the jurisdiction of the Court of Claims in that the alleged cause of action is in the nature of a tort and for the further reason that the action would be barred by the statute of limitations." In his petition to Congress that it enact the jurisdictional act plaintiff stated: "He now prays that the Congress will pass a bill to refer his claim to the Court of Claims that they may give said Gregory his day in court and make findings on the merits of case according to the law and the evidence." The Congressional Committees in recommending passage of the act set forth that "The present bill merely confers jurisdiction upon the Court of Claims of the United States and in view of the complete testimony which has been presented by the claimant, your committee is of the opinion that he should be given his day in court." There was clearly no concession of liability.

The ground of plaintiff's claim on the merits for damages is that the Commissioner's Office in Washington was guilty of gross official carelessness in denying him an opportunity to be heard before assessment by mailing the 60-day deficiency notice of March 11, 1931, to plaintiff at an alleged improper address, i. e., to the Marion Hotel, Little Rock, Ark., instead of to his "last known address" at 2014 Glendon Avenue, Westwood Hills, Los Angeles, California, as mentioned in

his letter of January 1931 written from the Marion Hotel, Little Rock, Ark. It is also claimed that failure to mail the deficiency notice to the proper "last known address" rendered the assessment illegal and void.

A study of the record and the facts as set forth in the findings discloses that plaintiff was dilatory and negligent in not properly handling his tax controversy from the beginning and in not giving the Commissioner proper or definite information as to his regular or permanent residence or address, either in or outside of Arkansas. Plaintiff filed his return in Arkansas and the Commissioner had a right to assume that plaintiff had his permanent residence in Arkansas, and Little Rock was the only address he had. The income tax statute (section 53 (b) (1), Revenue Act of 1928, as well as corresponding sections of all prior acts) provided that, in case of individuals, "Returns shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland." The return for 1928 filed with the Collector at Little Rock, Ark., was prepared by an agent (the auditor for the Gregory Bus Lines, Inc.) and showed the address in Memphis, Tenn., of the agent and the Bus Lines. It disclosed no address of plaintiff in Arkansas, and stated that Gregory was "temporarily residing in California." This return, which was forwarded to the Commissioner by the Collector at Little Rock, Ark., disclosed income by plaintiff, as president of the Gregory Bus Lines, Inc., with principal office at Memphis, Tenn., and also the sale by plaintiff of all the stock of the Bus Lines to the Consolidated Utilities, Inc., May 29, 1928. The return was therefore sent to the Internal Revenue Agent in Charge at Nashville, Tenn., for investigation and audit. The audit was made and a report thereof was submitted to the Commissioner October 31, 1930, and a copy was furnished to plaintiff. In the meantime plaintiff and his wife separated while they were temporarily residing in California, and, as a result of litigation between them, a receiver in Memphis, Tenn., took possession of certain of plaintiff's property (see finding 5). As a result, the Com-

missioner made a jeopardy assessment against plaintiff December 11, 1930, under the receivership provision of section 274 (a), Revenue Act of 1928, of an additional tax of $13,973.61 shown by the audit above mentioned, and claim therefor was filed with the receiver. Plaintiff received due notice of this additional tax and interest assessment, together with a full explanation of the computation thereof, and protested it in a letter to the Commissioner written from 2645 Oakview Terrace, Maplewood, Mo., and asked for a hearing at Memphis, Tenn. This letter was acknowledged and plaintiff was informed that he would be advised as early as practicable with reference to the hearing at Memphis. In the meantime plaintiff wrote the Commissioner the letter of January 19, 1931, from the Marion Hotel, Little Rock, Ark., quoted in finding 5, and thereafter received, in California, the Commissioner's reply of January 26, also quoted in finding 5. Plaintiff did not go to Nashville for a hearing.

On March 3, 1931, the Commissioner, upon finding that a receiver in Tennessee had not been appointed to take over all the property of plaintiff, withdrew and cancelled the jeopardy assessment which had been made under the receivership section, 274 (a), because that section was not applicable in the circumstances, and so notified plaintiff in care of the receiver at Memphis, but the Commissioner did not withdraw and there was nothing in this notice which plaintiff received, or elsewhere, to indicate to plaintiff that the Commissioner intended to eliminate or withdraw the Government's claim against plaintiff for the additional tax for 1928. The matter was then entirely open to plaintiff, as it had been since December 11, 1930, to make a proper showing by submission of proper proof that the claimed additional tax was excessive. Plaintiff did not do this and he did nothing further until he received on June 6, 1931, at Clayton, Mo., through his attorney, Wilfred Jones, notice and demand from the collector at Little Rock, Ark., for the additional tax assessed in May 1931 of $13,973.61 and interest of $1,848.73. On June 22, 1931, plaintiff wrote the collector at Little Rock stating that he did not owe the tax, and further stating that "Some time ago I requested your Nashville, Tenn., Agent to permit me to appear before them and protest against such assessment as

was claimed as I told them at that time that I had paid all that was due and that I did not owe this and they said they would notify me when they would hear me on the matter, to date this is the first I have heard." Plaintiff must have had reference to his letter to the Commissioner of December 29, 1930 (finding 5), for there is no evidence that he subsequently wrote the Nashville, Tenn., office in an endeavor to have a hearing before the Agent in Charge at Nashville.

Subsequent events and the filing of the lien August 13, 1936, are sufficiently detailed in findings 7 to 12, inclusive. Plaintiff wrote a number of letters from various places, as the findings show, but in none of them except the letters of October 2 and 14, 1931, did he present any proper evidence or facts to the Commissioner or the Agent in Charge in support of his assertion that the additional tax for 1928 was excessive, or advise the Commissioner where the facts relied on could be found. It was his duty to properly prosecute his claim and to protest by submitting evidence of the value of the stock and notes of the Consolidated Utilities, Inc., which he knew at all times after December 11, 1930, were the basis of the claimed additional tax.

The claim of "gross official carelessness" or negligence on the part of the Commissioner's Office will first be discussed. If plaintiff has failed to establish by the greater weight of the evidence that the Commissioner's Office was negligent or careless in connection with the mailing of the deficiency notice, he cannot recover. The claim is one sounding in tort, and the limitation on our jurisdiction in that regard has been waived. If the evidence here shows that the Commissioner's Office acted with reasonable care under the facts and circumstances and under the pertinent statutory provisions as to his duty in the premises in connection with mailing of the deficiency notice to plaintiff, care of the Marion Hotel, Little Rock, Ark., then plaintiff cannot recover damages on the ground that he did not have an opportunity after March 11, 1931, to appeal to the Board of Tax Appeals before assessment of the deficiency in May 1931, or on account of the filing of the lien. The case is somewhat unusual in that plaintiff was first officially and formally notified December 11, 1930, of the Government's claim against him for the additional tax

of $13,973.61, and its claim for that additional tax was never withdrawn or cancelled. Although this was not the deficiency notice mentioned in sec. 272 (a), plaintiff had a period of three months before the mailing of the deficiency notice of March 11, 1931, within which to show that the tax was excessive; he was afforded every proper opportunity to do so, but he did not avail himself of it. Since plaintiff had not done this, the Commissioner, after he had withdrawn the jeopardy assessment under section 274 (a), was required either to make another jeopardy assessment under section 273 (a), Revenue Act of 1928, and mail a deficiency notice within 60 days thereafter, or mail a deficiency notice before assessment under section 272 (a) of that act. The Commissioner acted under the latter section. This section provides that when the Commissioner determines that there is a deficiency in tax he shall send notice thereof to the taxpayer by registered mail, and that within 60 days after such notice is mailed the taxpayer may file a petition with the Board of Tax Appeals (now the Tax Court) for a redetermination of the deficiency. The section further places a prohibition (where collection is not jeopardized) upon assessment and attempt to collect without the mailing of the 60-day notice and for specified periods thereafter by providing that "No. assessment of a deficiency * * * and no distraint or proceeding in court * * * shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final." The levying of a lien is within this prohibition. However, the section further provides, for the protection of the taxpayer, that "Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court." Subsection (k) of section 272 provides that "notice of a deficiency in respect of a tax imposed by this title, if mailed to the taxpayer at his last known address, shall be sufficient for the purposes of this title * * *."

Plaintiff says that his "last known address" within the

meaning of subsection (k) was 2014 Glendon Ave., Westwood Hills, Los Angeles, Calif., and that the Commissioner violated section 272 (a) and (k) in sending the deficiency notice care of the Marion Hotel at Little Rock, Ark., and that he was guilty of negligence in not mailing the notice to the Los Angeles, Calif., address. Upon the facts disclosed by the evidence and the circumstances, we do not think the Commissioner was negligent or careless nor do we think he violated the statutory provisions mentioned (see finding 10). When the Commissioner came to the mailing of a deficiency notice he was in a position where he had to decide whether, under section 272 (a) and (k), it should be mailed to the temporary California address of uncertain duration given about two months earlier or whether he should mail it to what he appears to have believed was plaintiff's permanent residence or address in Arkansas where he had filed his return. The Commissioner appears to have believed that Little Rock, Ark., was plaintiff's legal and permanent address. He was not required to make an independent investigation. The paramount duty rested upon plaintiff to supply the Commissioner with proper information as to his permanent address, or as to a temporary residence or address of a definite period. The Commissioner was entirely justified in assuming that plaintiff's legal and permanent residence was in Arkansas. Plaintiff had so indicated under section 53 (b) (1) of the 1928 Revenue Act by filing his return at Little Rock. The fact, as it turned out, that plaintiff would have received the deficiency notice if it had been mailed to the temporary California address is not controlling on the question of whether plaintiff is entitled to recover damages.

A consideration of the language of section 272 (k) in the light of the Reports of the Congressional Committees with reference thereto indicates that the phrase "last known address" of the taxpayer had reference to the last known permanent address or legal residence of the taxpayer, or the last known temporary address of a definite duration or period to which *all* communications during such period should be sent. Any other interpretation would place the Commissioner in an awkward and uncertain situation and would open the door to numerous complaints such as this one. Many

taxpayers, especially business men, travel from place to place, but they nearly always have a permanent address at or from which they will receive mail. The trouble with plaintiff was that, as he testified, he had no permanent address or residence during the year 1931. But the Commissioner did not know this. Plaintiff further testified, however, that after the fall of 1928 the Marion Hotel at Little Rock was the only address which he ever had in Arkansas when he was there. He further testified that he never left forwarding addresses. The statute obviously was intended to protect the Government against such conditions, rather than placing upon its officials the duty and responsibility of finding out before mailing a deficiency notice whether the last known address in the state where the return was filed was a proper address, or whether or not a taxpayer was still at some temporary address of uncertain duration, and especially a temporary address which had been given for a definite and specific purpose which had already been accomplished.

Plaintiff testified that from 1910 he lived at the Marion Hotel whenever he was in Little Rock, and he appears to have been there often and for considerable periods. He also testified that during the time he was "in the bus business" he maintained a room at the Marion Hotel "practically all the time." There is no evidence how much time, if any, plaintiff spent at Parkin, Ark., which address the Commissioner did not have, and which plaintiff testified was his permanent legal residence when he filed his return but was not his residence after the fall of 1928.

The provisions of section 272 (k), Revenue Act of 1928, with reference to "the last known address" were first enacted in section 281 (d), Revenue Act of 1926, and then related only to the mailing of a deficiency notice to a person acting in a fiduciary capacity, such as a guardian, trustee, executor, administrator, receiver, or conservator, or to a transferee of assets of a taxpayer; or to the taxpayer (for whom or in the place of whom such person may be acting) "at his last known address" in case the Commissioner was not notified of the fiduciary or transferee to whom the notice might be mailed. (See Senate Finance Committee Report No. 52, 69th Cong., 1st Sess., p. 30). In 1928 the provision was made applicable

to the mailing of deficiency notices generally, committee report on the 1928 Act (House Ways and Means Committee Report No. 2, 70th Cong., 1st Sess., p. 22), stating that "It is obviously impossible for the Commissioner to keep an up-to-date record of taxpayers' addresses. Where a taxpayer has changed his address without notifying the Commissioner, it is not possible to be sure that the deficiency letter is being sent to his last address. It is provided in the above section (272 (k)) that the deficiency letter may be mailed to the taxpayer at his last known address and, if so mailed, it will "be sufficient for the purposes of this title * * *." This explanation indicates that, by the statutory reference to "the last known address" of the taxpayer, Congress had in mind and intended the taxpayer's regular or permanent address, or residence, and to a change thereof without notice. It would be unreasonable to hold that it had reference to notice of a temporary address in connection with a trip to some other place indefinite and uncertain in duration, and especially is this true where the notice of the temporary address given was for the purpose of being advised with reference to a specific matter. At this point it is pertinent, for the purpose of determining whether the Commissioner was negligent, to look into the circumstances under which and the purpose for which plaintiff wrote the Commissioner on January 19, 1931. It will be seen from the findings that plaintiff had written the Commissioner from Maplewood, Mo., protesting the deficiency of $13,973.61, notice of which was mailed him December 11, 1930, and was received December 18 (the same deficiency which was later assessed the second time and with respect to which the lien was subsequently filed), and asked for a hearing at Memphis, Tenn. The Commissioner wrote him at Maplewood, Mo., telling him that he would be further advised about the matter as soon as practicable. Before the matter of the hearing which plaintiff had requested at Memphis had been decided upon and arranged for by the Commissioner to be held at Nashville instead of at Memphis, the Commissioner received plaintiff's letter from the Marion Hotel, Little Rock, Ark., in which he acknowledged receipt of the letter sent to Maplewood, Mo., which he stated had been "forwarded to me here." This let-

ter of January 19 was not a notice of change of plaintiff's residence or address in Arkansas within the meaning of section 272 (k); it related only to the matter of being notified with reference to the hearing which had been requested, and stated that "I am leaving today for Los Angeles, Calif., where I expect to remain for several months, * * *. So please advise me there when my petition for a hearing will be had, and I wish to handle the matter there if it is possible." Soon thereafter the Commissioner in a letter of January 26, 1931, sent to the Los Angeles, Calif., address replied to this letter, as well as to the letter of December 29, 1930, both relating to a hearing (see finding 5), and told plaintiff that it was impractical to grant a hearing in California and that the matter had been referred to the Agent in Charge at Nashville who would take such steps as were necessary to determine the facts concerning the correct tax and that plaintiff should submit any further data concerning the matter to the agent there. By this letter the Commissioner afforded plaintiff a proper opportunity to be heard, but plaintiff did not avail himself of it. Plaintiff apparently remained in California. However, when the Commissioner had written this letter the object and purpose for which the California address had been given were fulfilled. After that the Commissioner obviously had no way of knowing, without further inquiry, whether plaintiff was in California, Arkansas, or Nashville, Tenn. In such circumstances the natural thing for the Commissioner to do, and the thing which we think the statute contemplated and required that he should do, was to mail the 60-day deficiency notice to plaintiff's last known address in the state in which he had filed his return and in which, so far as appeared, he was a legal resident. That address was the "Marion Hotel, Little Rock, Ark."

Plaintiff argues that there is in the record no explanation as to why the notice was sent to Little Rock, Ark., instead of to California. It is true that no one testified as to why the notice was so mailed, but there is in the evidence of record a sufficient explanation since all the evidence itself testifies to the correctness and legality of the Commissioner's action, and overcomes the charge of gross carelessness and negli-

gence. Moreover, we think the evidence, as a whole, shows extreme negligence on the part of plaintiff in not properly handling his case during the period of nine months prior to August 13, 1931, when the tax lien was filed. If he had properly prosecuted his protest and supported it by furnishing evidence during the period from December 11, 1930, to March 11, 1931, such as he submitted for the first time October 2, 1931, the asserted deficiency would doubtless have been in the main eliminated, and there would have been no 60-day deficiency notice or assessment of the amount in question. But he did not make such evidence available to the Commissioner until after October 2, 1931. In a letter of that date from California plaintiff advised the Commissioner for the first time that the records and evidence, which he believed would show that the Consolidated Utilities' stock had no value and that he did not, therefore, owe the deficiency, were in the possession of his attorney at Jonesboro, Ark., and requested him to send one of his agents there to investigate and consider this evidence and to confer with plaintiff's attorney about the matter in order to save plaintiff the expense of compiling the evidence and submitting it to the Commissioner. At or about the same time plaintiff sent the Commissioner's audit statement and computation of the deficiency (apparently the revenue agent's report and the audit statement of December 11, 1930) to his attorney at Jonesboro, Ark., and asked his advice in the premises and received a favorable reply October 12. On October 14, 1931, plaintiff sent this letter, in which the attorney gave his opinion on the facts that plaintiff did not owe the claimed deficiency, to the Commissioner in connection with the letter of October 2, *supra*. The Commissioner promptly sent an agent to Jonesboro to make an investigation and report, and so advised plaintiff. The investigation was made and, as a result, plaintiff was advised March 29, 1932, that the 1928 deficiency of $13,973.61, plus interest, had been reduced to $123.10 and interest of $16.29, a total of $139.39 (see finding 12).

In addition to what has hereinbefore been said, there is another matter that should be mentioned with reference to the

period subsequent to March 11, 1931, in connection with the question of whether plaintiff was diligent in protecting his interests. When he received the collector's letter of June 27, 1931 (see finding 7), plaintiff knew that he had not received the 60-day deficiency notice of March 11, 1931. However, he made no protest on that account then or later when he received the Commissioner's letter of September 24, 1931 (finding 11). Plaintiff's claim for damages is based on the effect of the lien filed August 13, 1931. If he felt when he received the collector's letter of June 27, or on August 13, 1931, as he now claims, that he was being prejudiced or damaged on account of the assessment by reason of not having received the deficiency notice, or on account of the improper mailing of it, he had available, under the very section on which he bases his claim, the remedy of injunction to prevent collection or enforcement of the assessment provided for in a proper case by section 272 (a) of the Revenue Act of 1928. This remedy of injunction to test the legality of the assessment had been available to plaintiff for 47 days prior to August 13, 1931, and was available to him at all times on and after August 13, 1931, but no effort to invoke it was made. Even if it were found that the assessment in May 1931 had been improper and not in strict accordance with section 272, it was not void but voidable. See *Lehigh Portland Cement Co.* v. *United States*, 90 C. Cls. 36, 49–51, 60–69.

Plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

WHALEY, *Chief Justice;* and BOOTH, *Chief Justice* (retired), recalled, concur.

WHITAKER, *Judge*, dissenting:

I do not think the Commissioner complied with the provisions of law for giving notice before the assessment of a deficiency in tax. This notice was mailed to plaintiff at the Hotel Marion, Little Rock, Arkansas, but the Commissioner had no reason to believe that this was plaintiff's last known address. Plaintiff's return was filed in Little Rock, Arkansas, but the address given on it was "H. M. Gregory, L. C.

Gaty, Agt., 205–9 South Second Street, Memphis, Shelby County, Tennessee." On this return it was stated, "Mr. H. M. Gregory is temporarily residing in California * * *."

On June 10, 1929, plaintiff wrote the Collector at Little Rock:

> * * * I would also thank you to change my address from 205 South 2nd Street, Memphis, Tenn., to read 1256 Woodruff Ave., Westwood Hills, Los Angeles, Calif., as I have moved out here. Also could it be arranged for me to pay the future payments here.

In reply the Collector notified plaintiff:

> As suggested in your letter, I am transferring the balance of your tax to Los Angeles and the quarterly installments for September and December should be made in that District.

On account of an attachment against plaintiff's property, levied at the instance of his wife, the Commissioner made a jeopardy assessment on December 11, 1930, against plaintiff. Plaintiff protested against this on December 29, 1930, in a letter written from 2645 Oakview Terrace, Maplewood, Missouri. Receipt of this letter was acknowledged in a letter to plaintiff addressed to him at Maplewood, Missouri.

Then on January 19, 1931, plaintiff, on the stationery of the Marion Hotel in Little Rock, Arkansas, wrote the Commissioner relative to the assessment against him and in that letter stated:

> I am leaving today for Los Angeles, Calif., where I expect to remain for several months. My address there will be 2014 Glendon Ave., Westwood Hills, Los Angeles, Calif.

The Commissioner replied to this letter and addressed plaintiff at the last named address in Los Angeles.

It is evident from this that the Commissioner had no reason to believe that plaintiff's permanent address was the Hotel Marion, Little Rock, Arkansas. The address given on his return was Memphis, Tennessee, but before all the taxes due on that return had been paid plaintiff notified the Collector that he had moved to Los Angeles, and in his letter of Janu-

ary 19, 1931, he told the Commissioner explicitly that he would not be at the Hotel Marion after that date, but would be in Los Angeles, although at a different address in Los Angeles from that given in his letter of June 10, 1929. Plaintiff's "last known address" was 2014 Glendon Avenue, Westwood Hills, Los Angeles, California, and the Commissioner, therefore, was entirely unwarranted in mailing the deficiency notice to him at Little Rock, Arkansas.

The Commissioner was prohibited by law from making any assessments until after the giving of the sixty-day notice required by law. Since this notice was not given, the Commissioner was without authority to make the assessment in May 1931, and, therefore, was without authority to levy the distraint warrant. If, therefore, the levy of the distraint warrant caused plaintiff any loss, he is entitled to recover under the terms of the jurisdictional Act.

Plaintiff's own testimony and that of a Mrs. McKinley show that he had a firm offer for the equity in his home on Woodruff Avenue of $12,500, and that he told the person making the offer that he would accept it as soon as he could get the tax lien lifted. Before he could get it lifted, the offer was withdrawn. Thereafter the real estate market had so declined that plaintiff was unable to dispose of his home and it was sold under foreclosure and plaintiff lost his entire equity in it. I think he is entitled to recover $12,500 at least.

I think this is all he is entitled to recover because I do not think he has shown that he could or would have disposed of his other properties even though the tax lien had not been asserted against him. He showed an offer for the purchase of some of his household furnishings, but he does not say that he would have accepted this offer and would have made the sale, except for the tax lien asserted against his property, nor has he shown that the tax lien prevented him from selling his other properties.

I think plaintiff is entitled to recover the sum of $12,500.00.

MADDEN, *Judge*, concurs in the foregoing opinion.

NATIONAL SURETY CORPORATION v. THE UNITED STATES

[No. 45797. Decided December 4, 1944. Defendant's motion for new trial overruled March 5, 1945]

On the Proofs

Government contract; deduction of liquidated damages not allowed where defendant terminates contract upon contractor's refusal to proceed and surety's refusal to complete.—Where upon contractor's refusal to proceed further in the performance of its contract and surety's refusal to complete the contract, after notice of default; and where thereupon the defendant terminated the contract and let the contract to another contractor; it is *held* that the plaintiff, surety, is entitled to recover for liquidated damages deducted by defendant from amount admitted to be due to the first contractor for work actually performed prior to default.

Same; alternative rights given to Government upon contractor's default.—Following the decision in *United States* v. *American Surety Company*, 322 U. S. 96, 100–101, it is *held* that the rights given to the Government by article 9 of the construction contract are alternative, and where the defendant, upon default by the contractor, chose to avail itself of the right to terminate the contract the defendant could not also deduct liquidated damages, which was a right the defendant had only where it chose the second alternative of allowing the contractor to proceed to complete the work, although late in doing so. *Commercial Casualty Co.* v. *United States*, 83 C. Cls. 367, 372–6; *Whelan & Sons Co.* v. *United States*, 98 C. Cls. 601.

Same; lack of authority to deduct liquidated damages except under article 9.—Unless article 9 of the contract is applicable to the conditions in the instant case, there is no provision in the contract for liquidated damages; and the defendant was, therefore, without contractual authority to make the deduction in the instant case.

Same; liquidated damages no proof of actual damages.—Where it is claimed by the dfendant that the liquidated damages set out in the contract constitute proof of actual damages, which the defendant claims the right to recover in any event; it is *held* that the contract itself negates this claim; actual damages might be much more, much less or the same as liquidated damages.

The Reporter's statement of the case:

Mr. B. J. Gallagher for the plaintiff.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon a stipulation of facts entered into by the parties:

1. The plaintiff, National Surety Corporation, is a corporation duly organized and existing under the laws of the State of New York, and is engaged in the bonding and insurance business with principal offices in New York City, New York.

2. Under date of September 22, 1936, the defendant, through E. Reybold, Lt. Colonel, Corps of Engineers, United States Engineer Office, Memphis, Tennessee, entered into a written contract No. W–1092eng5352 with Elkas Construction Company, Incorporated, for the furnishing of all materials and the performance of work for the construction of earthwork in the Upper Yazoo and White River Levee Districts, items Nos. L–275 and R–365A–1 referred to in the specifications accompanying the contract. The specifications are serial No. 1092–37–61F, as modified by the contracting officer in letter entitled "Notice to Prospective Bidders (1)", dated August 27, 1936. The amount of the contract is $36,400.00 (approximately). The amount actually paid under this contract to Elkas Construction Company and Jones & Shepard, the completing contractor after Elkas' default, as hereinafter referred to, was $38,829.64.

3. The specifications provided in paragraph 3 for liquidated damages for delay at the rate of $20.00 per day.

4. The Elkas Construction Company and the plaintiff, National Surety Corporation, as surety, executed and delivered to the defendant a payment bond and a performance bond, each dated September 23, 1936, in favor of the defendant as obligee, each bond being in the sum of $18,200.00. The performance bond was conditioned for the performance of the contract, and the payment bond was conditioned for the payment to all persons supplying labor and

material in the prosecution of the work provided for in the contract.

5. Paragraph 2 of the specifications required the contractor to commence work within 20 calendar days after the date of receipt of notice to proceed, and to complete within the time specified in paragraph 34 of the specifications. Paragraph 34 of the specifications required the completion of Item L–275 on or before December 15, 1936, and the completion of Item R–365A–1 on or before December 1, 1936. The contractor received notice to proceed on October 16, 1936, thereby establishing November 5, 1936 as the date for the contractor to commence work. The contractor had started work September 17, 1936. Due to high stages of the river, work on both items was suspended January 6, 1937, and remained suspended through May 1937.

6. On May 11, 1937, the Elkas Construction Company wrote a letter to defendant as follows:

> Referring to contract with the United States of America, dated September 22, 1936, and more particularly described as Agreement W–1092 Eng. 5352, contract No. 1092–37–61F, in the approximate amount of $36,400.00, for levee work in the Upper Yazoo and White River Levee Districts, Items Nos. L–275 and R–365A–1, it becomes necessary, because of financial difficulties contributed to by unavoidable delays in the prosecution of the work under the contract, for the undersigned as the contractor to advise you of inability to proceed with the work or any remaining part thereof and prosecute it to completion.
>
> This letter is written in response to your recent notice that the work, suspended as a result of flood conditions and other unforeseeable causes, should be resumed, particularly in connection with Item L–275, and to the end that appropriate action, terminating our right to proceed with the work, and as provided for under the terms of the contract, may be taken by you.

7. On May 19, 1937, the defendant, through R. D. Burdick, Major, Corps of Engineers, wrote the plaintiff, National Surety Corporation, as follows:

> This is to advise that the Elkas Construction Co., Inc., contractor for certain levee work under the above con-

tract on which you are sureties, has, by written notice to this office dated May 11, 1937, defaulted the contract, and copy of said notice is enclosed herewith.

You are requested to advise this office promptly as to what action, if any, you contemplate taking in the matter of securing the completion of the work.

The contractor's default does not constitute a termination of the contract.

Liquidated damages will accrue on each item of work until the contract is terminated, which must be authorized by the Department at Washington.

8. On May 24, 1937, plaintiff wrote a letter to the defendant as follows:

> Acknowledgement is made of the receipt of your letter of May 19, enclosing copy of letter dated May 11, in which the contractor notified you of default in the performance of its contract.
>
> Pursuant to your request for advice as to the action contemplated by this Corporation in securing the completion of the work, you are advised on behalf of the Corporation that it respectfully declines the privilege of completing the same for its principal.

9. On June 17, 1937, the defendant, through E. Reybold, Lieut. Col., Corps of Engineers, District Engineer, wrote Elkas Construction Company, and the plaintiff, National Surety Corporation, as follows:

> Referring to your Contract No. W-1092-eng. 5352, dated Sept. 22, 1936, for the construction of earthwork in the Upper Yazoo and White River Levee Districts, you are advised that under provisions of Article 9 of the contract your right to proceed with the work was terminated by the Chief of Engineers, U. S. Army, on June 9, 1937, the contractor having indicated by letter of May 11, 1937, inability to complete the work, and the surety, in letter of May 24, 1937, having expressed its unwillingness to complete the work under the terms of the contract.
>
> You are further advised that the United States will hold you responsible for any excess costs that may be incurred on account of the default in the performance of the work under the above-mentioned contract.

10. Article 9 of the contract reads in part as follows:

> *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with

> such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government, may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: * * *

11. On September 20, 1937, the defendant advertised for bids for completion of the work left uncompleted by Elkas Construction Company. Bids were received on October 4, 1937, and the contract for completion was awarded to Jones & Shepard, 1256 Union Avenue, Memphis, Tenn., on October 22, 1937. The work on item L–275 was completed on November 9, 1937, and on item R–365A–1, on December 26, 1937.

On January 20, 1938, the defendant, through James D. Andrews, Jr., Major, Corps of Engineers, presented the plaintiff, National Surety Corporation, with a bill for reimbursement as follows:

Invoice No. 3120

WAR DEPARTMENT
U. S. ENGINEER OFFICE
P. O. BOX 97
MEMPHIS, TENN.

Date January 20, 1938

National Surety Corporation,
New York, N. Y.

Paid on Voucher Month Number	Description	Amount Total
	Reimbursement for excess cost of contract W-1092-eng. 5352 with Elkas Construction Co., Inc., on Items L-275 and R-365A-1 as per attached statement	$3,583.66

Appropriation Creditable: Flood Control, Mississippi River and Tributaries, Allotment 70200—Levees

Appropriation Chargeable:
Allotment

I certify that the above bill is correct and just, and that payment therefor has not been received.

Please make check payable to:
"Disbursing Officer,
U. S. Engineer Office,
Memphis, Tenn."

L. E. Mielenz,
Captain, Corps of Engineers,
Disbursing Officer.

In the absence of:

James D. Andrews, Jr.,
Major, Corps of Engineers,
Assistant.

Reimbursements due on Contract W-1092-eng 5352 with Elkas Construction Co., Inc., on Items L-275 and R-365A-1.

Excess Costs incurred for completing work remaining to be done at time right of contractor to proceed under the contract was terminated.

Paid to Jones & Shepard for yardage placed:

L–275 12,169 cu. yds. @ 24.90¢	3, 030. 08		
R–365A–1 15,507 cu. yds. @ 25.90¢	4, 016. 32	7, 046. 40	

Amount which Elkas Construction Co., Inc., would have received for the work:

L–275 12,169 cu. yds. @ 18.00¢	2, 190. 42		
R–365A–1 15,507 cu. yds. @ 28.00¢	4, 341. 96	6, 532. 38	514. 02

Engineering and Inspection expenditures incurred after the right of contractor to proceed under the contract was terminated:

L–275		634. 76	
R–365A–1		1, 056. 04	1, 690. 80

Amount due United States because actual payments exceed net amount due Elkas Construction Co. for work:

Amount paid to Elkas Construction Co., Inc.		32, 888. 48	

Amount earned by Elkas Construction Co., Inc.

L–275 115,628 cu. yds. @ 18.00¢	20, 813. 04		
R–365A–1 64,345 cu. yds. @ 28.00¢	18, 016. 60		
	38, 829. 64		

Less liquidated damages accrued to date the right of contractor to proceed under the contract was terminated.

L–275 176 days @ \$20.00	3, 520. 00		
R–365A–1 190 days @ \$20.00	3, 800. 00		
	7, 320. 00		
Net contractor's earnings		31, 509. 64	1, 378. 84
Total due United States			3, 583. 66

12. The letter of January 20, 1938, is as follows:

> On June 17, 1937, you were advised that under provisions of Article 9 of contract No. W–1092–eng 5352, the right of the Elkas Construction Co., Inc., to proceed with the work was terminated by the Chief of Engineers, U. S. Army. You were further advised that the United States will hold you responsible for any excess costs that may be incurred on account of the default in the performance of the work under the above-mentioned contract. The contract involved the construction of earthwork in the Upper Yazoo and White River Levee Districts.
>
> The work remaining to be performed at the time of the termination of the contractor's right to proceed has now been completed. There is inclosed a reimbursement bill for the amount due the United States because of default by the contractor in the performance of the work under the contract. It is requested that prompt payment be made to the Disbursing Officer, U. S. Engineer Office, Memphis, Tenn.

13. Upon final settlement the United States deducted $514.02 for excess cost of completion, $1,690.80 for engineering and inspection expenditures, and $1,180.00 for liquidated damages, having remitted $6,140.00 of the liquidated damages first assessed in the bill for reimbursement referred to in finding 10. The 59 days liquidated damages is for the delays on both Items L–275 and R–365A–1 between the dates established in the specifications for the completion of the respective items and January 6, 1937, the date of suspension of the work. Voucher in the sum of $2,556.34 was thereupon tendered Elkas Construction Company in final payment of work performed under the contract. The Elkas Construction Company and plaintiff refused to accept the deduction of $1,180.00 for liquidated damages and signed the final payment voucher with the reservation of the right to make claim for the liquidated damages so deducted.

14. The plaintiff's loss in payment of labor and material bills under its payment bond in favor of the defendant, which bills were incurred by the contractor in connection with the contract, amounted in the aggregate to a sum in excess of the amount claimed by plaintiff in this suit, to wit: the sum of $6,891.99.

15. There has been no assignment of this claim by the plaintiff, and the plaintiff is the sole owner thereof.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff was the surety on a performance bond given by the Elkas Construction Company for the faithful performance of its contract with the defendant for the construction of earthwork in the Upper Yazoo and White River Levee Districts. Upon the contractor's default in the performance of its contract the defendant terminated its right to proceed and let a contract to another contractor for the completion of the work. The defendant later deducted from the amount due the first contractor both the excess cost of completion and liquidated damages for delay. This suit is to recover the liquidated damages deducted.

The completion date of the contract was December 1, 1936, for item R–365A–1 of the contract, and December 15, 1936, for item L–275. Neither item had been completed on January 6, 1937, when the work was suspended due to inclement weather and high water. Upon receipt of notice to resume work the contractor notified defendant it was unable to complete the contract "because of financial difficulties contributed to by unavoidable delays in the prosecution of the work. * * *"

The defendant gave the surety notice of this letter from the contractor, advised it, "The contractor's default does not constitute a termination of the contract," and asked it if it intended to complete it. The surety declined the privilege of doing so; whereupon, the defendant wrote it and the contractor, "* * * you are advised that under provisions of article 9 of the contract your right to proceed with the work was terminated by the Chief of Engineers, U. S. Army, on June 9, 1937, * * *."

The Supreme Court held in *United States* v. *American Surety Company*, 322 U. S. 96, 100–101, that the rights given by article 9 were alternative, and that where the defendant chose to avail itself of the right to terminate the contract,

it could not also deduct liquidated damages, which was a right it had only where it chose the second alternative of allowing the contractor to proceed to complete the work, although late in doing so. Only in the latter event, it was held, was it entitled to liquidated damages.

But the defendant in this suit says article 9 has no application to a case where the contractor's right to proceed with the work is terminated because of his refusal to proceed further. We do not so read the article. It reads: "If the contractor *refuses* or *fails* to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified * * *" [italics ours], the Government may terminate its right to proceed. The article, therefore, applies not only to a failure to proceed with diligence, but also to a refusal to do so.

The defendant says the article has application only to a case where the contractor is proceeding with the work, but not with diligence, and has no application to a case where he refuses to proceed at all. This is plainly incorrect. What the Government was trying to secure by this article was the finishing of the work on time. It did not get this any the less when the contractor refused altogether to go on with the work than when he was merely dilatory in doing so. In order to get its job done on time it reserved to itself the right to terminate the contractor's right to proceed and to give the job to someone else where it appeared the contractor was not going to get the work done on time. Manifestly, it would wish to avail itself of this remedy just as much in a case where the contractor refused to proceed at all as in a case where he was proceeding too slowly.

Diligence is no absolute word; there may be great diligence, a lesser degree, still lesser and lesser, and it may fade away into a complete want of it. Whatever the degree, the Government desired the right to terminate the contractor's right to proceed, to give the work to someone else, and get its building when it wanted it. Is there any reason to believe the Government desired this right when there was a complete want of diligence and did not desire it when the contractor refused to go on with the work at all?

We think article 9 is applicable to the situation presented

in this case; but if the defendant is right in saying article 9 has no application to such a case, then in such case there is no provision anywhere in the contract for liquidated damages, and the defendant was, therefore, without contractual authority to deduct them.

Defendant is clearly wrong in saying that the liquidated damages set out in the contract is any proof of actual damages, which it claims the right to recover, in any event. The contract itself negates this. It says, "* * * the actual damages for the delay will be impossible to determine, * * *" and for this very reason the parties agreed on liquidated damages. Actual damages might be much more, much less, or the same as liquidated damages. What they actually were, we do not know.

It is no answer to say that this construction of the contract leaves it within the power of the contractor, by abandoning the contract, to escape liquidated damages altogether. This means of escape was recognized by the Supreme Court in the *American Surety Company* case, *supra*, but it nevertheless held that liquidated damages could not be deducted where there had been a termination of the contract.

We are of opinion that article 9 is applicable to the situation presented in this case and that under the decision in the *American Surety Company* case, *supra*, the Government, having terminated the contractor's right to proceed, was not entitled to deduct liquidated damages. This we expressly held in the case of *Commercial Casualty Co.* v. *United States*, 83 C. Cls. 367, where the facts were the same as here. Cf. *John M. Whelan & Sons Co.* v. *United States*, 98 C. Cls. 601.

Plaintiff is entitled to recover from the defendant the amount deducted, which was the sum of $1,180.00. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge;* WHALEY, *Chief Justice;* and BOOTH, *Chief Justice* (retired), recalled, concur.

LITTLETON, *Judge*, dissenting: The question presented in this case is whether under the provisions of art. 9 of the contract the Government is entitled to liquidated damages

for delay until completion of the work called for by the contract; and, also, the actual excess costs of completing the contract, when the contractor without any action by or fault on the part of the Government discontinued work thereunder and notified the Government, upon being ordered to proceed with the work and prosecute it to completion, that it could not continue with and prosecute the work or any part thereof to completion. Under that article and art. 1 the contractor had expressly promised and agreed to diligently prosecute the work to completion, even though it could not complete it within the time fixed by the contract if the Government did not, before completion, exercise the choice to terminate the right to proceed while the contractor was continuing with construction.

The majority opinion holds that the answer to this question is governed by the opinion in *United States* v. *American Surety Co.*, 322 U. S. 96, 100, 101, and that under that opinion the Government lost its right or waived its claim to liquidated damages under art. 9 by reason of a notice from the contracting officer on June 17, 1937 (finding 9), notwithstanding that notice was given only because the contractor had abandoned the work and committed a total breach of the contract on May 11, 1937. The notice advised the contractor and the surety, who had also refused to complete, that their right to proceed was terminated by reason of the previous notice of the contractor that it could not comply with the order of the contracting officer to proceed and of its inability to complete the remainder of the work. It seems obvious that if, in the circumstances, the surety, upon receipt of the Government's notice to it of May 19, 1937, had elected to complete the work the Government clearly would have been entitled not only to liquidated damages to the date of the contractor's abandonment of the work but, also, until the surety had completed it. The surety may not avoid liability by declining to complete. When the surety declined to complete, the Government's notice of June 17, 1937, was no more than a notice that it accepted a situation which it could not prevent and which it did not bring about. In reality the notice of June 17 was the kind of notice that would have been given on account of a total breach if the contract had

not contained the option to terminate given the Government by art. 9. In reality, also, this notice was based as it stated, on the ground of abandonment of the work by the contractor, and not on the ground that the Government had become dissatisfied with the progress of the contractor after the completion date fixed in the contract had passed. Nothing whatever was said in the notice about the progress of the contract being unsatisfactory. The only option to terminate the right to proceed which the Government had at the time the contractor abandoned the contract was its dissatisfaction with the progress which the contractor might be making, and not its dissatisfaction with the abandonment of the work by the contractor.

The question thus presented was not present and could not, under the facts, arise in the case of *United States* v. *American Surety Co.*, *supra*. It was not considered or mentioned by the court, and was not, of course, decided. I do not interpret the language of the Supreme Court in the *American Surety Company* case in answer to the contention there made by the Government in support of its claim on the facts, in that case for liquidated damages to the date of termination under art. 9 as indicating an intention to decide the issue which is here presented. In that case the court held that as a part of the bargain for the right to terminate the contractor's right to proceed while he was continuing with the work the Government, by the language of art. 9, agreed to waive its right to liquidated damages in the event it exercised the option to terminate the right to proceed because of continuous delay, and that this waiver was the legal consequence which followed from the exercise of that choice. The contractor reserved no choice to abandon the work in the event he could not complete it on time, or was thereafter delayed, and the court did not indicate that a waiver of liquidated damages would be the legal consequence of such an act by the contractor.

In the *American Surety Company* case the contract completion date as extended was June 20, 1933. The contractor failed to complete the work by the extended date but the Government did not, under the first option given by art. 9, take any action to terminate the contractor's right to proceed

prior to the completion date because of the contractor's refusal or failure to prosecute the work with such diligence as would insure its completion by the completion date as extended. When the completion date arrived and the work had not been completed, the Government still took no action to terminate the contractor's right to proceed further because of its failure to complete the work on time; not having done so, the contractor was compelled by art. 9 to continue with the work and complete it. Instead of terminating the right of the contractor to proceed, prior to or on the completion date, the Government, as it had a right to do under the contract, permitted the contractor to continue with the work, and the contractor did so, as it was required to do by the provisions of art. 9 so long as the Government did not thereafter terminate its right to proceed. While the contractor was thus continuing construction, the Government on July 20, 1934, thirteen months after the contract completion date as extended, and without any notice or indication from the contractor that it would abandon the contract or that it could not or would not complete the work called for, terminated the right to proceed with completion of the incomplete portion of the contract specifically under authority of art. 9 because of dissatisfaction with the continuous delays of the contractor. This action was initiated by the Government in the exercise of its option, and not by the contractor. The Government was not compelled to terminate. It had a choice. By taking such action the Government by the terms of the contract waived its right to claim the liquidated damages and was required, instead, to prove actual damages, if any, for delay by the contractor, and the excess costs of completion, as the Circuit Court of Appeals held, 136 Fed. (2d) 437. The issued thus presented and decided was stated by the Supreme Court to be "The Government's right to liquidated damages under these circumstances." Under the facts in this case the question is just the opposite to that which the Court decided in the *American Surety Company case*, and is whether the Government is entitled to collect liquidated damages for delay where the contractor, not having completed on time, undertakes to terminate its own right to

proceed fifty-nine days after the completion date by notifying the Government, upon being ordered to resume operations and proceed with construction to completion, that he is unable to proceed with the work, or any part thereof, and prosecute the same to completion. Plaintiff's answer to the Government's claim that this total breach entitled the Government to the agreed liquidated damages under the express language of art. 9 is that the contracting officer mentioned art. 9, in his notice of June 17.

In the *American Surety* case the Court appears to have emphasized the fact that under the plain language of art. 9 liquidated damages may not be claimed where the Government by its voluntary act taken under the choice given by art. 9 stopped the contractor and terminated his right to proceed while he was going on with the work, and, except for such termination, doubtless would have completed it so far as appears from the facts in that case. By the same token, it seems clear also under the plain language of art. 9 that if the contractor, without any action by the Government, stops work after the completion date and notifies the Government, in reply to an *order to continue*, that it cannot or will not proceed further and complete the work the Government is entitled to stipulated liquidated damages. In such a case there has been no waiver.

Plaintiff also relies upon the opinion of this court in *Commercial Casualty Insurance Company, a Corporation*, v. *United States*, 83 C. Cls 367, 372–6. In that case the completion date was May 28, 1930. On April 10, 1930, the contractor telegraphed the contracting officer that it was unable to proceed with its contract, and that the Government should take the necessary means to complete it. The contracting officer on April 15 wired the contractor that "The Bureau has been advised that you have stopped work under this contract. In accordance with art. 9 of the contract you are hereby notified that your right to proceed with this work is terminated." On the same day a copy of this telegram was sent to the surety and the surety elected to complete the work. It did so, but was forty-two days late on the basis of the delay properly chargeable to it.

In that case both parties and the Court appear to have treated the contracting officer's telegram of April 15 as a termination of the right to proceed strictly under the choice given the Government by art. 9, and the language used by the contracting officer gave some justification for that view. However, it seems to me upon further consideration this action was not the sort of termination as art. 9 contemplated as a condition to the waiver of liquidated damages. It was not voluntarily taken by the Government, but because the contractor had abandoned the work. In any event the issue raised and argued in the instant case was not presented and argued in that case. Moreover, the decision in that case is not necessarily in conflict with the view I take under the facts in the present case. In the former case the actions of the contractor and the contracting officer, if governed by Article 9, arose under the only option expressly given by art. 9 of the contract in that case to the effect that "If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, * * * the Government may, * * * terminate his right to proceed with the work or such part of the work as to which there has been delay." The Court interpreted the words "refuses or fails to prosecute the work" to mean that if the contractor abandoned the work altogether and the Government notified him that his right to proceed was terminated on that account, the Government could not claim liquidated damages. Whether the particular provision above referred to should be so interpreted is not involved in the present case, because the actions of the parties with which we are here concerned occurred after the date for completion had passed, and if it should be assumed that the Government did terminate the right of the contractor to proceed in the present case under such circumstances and in such a way as to bring its action within the provisions of art. 9, it acted under a different provision in art. 9 which gave it a third option which was not expressly written into art. 9 of the contract before the Court in the *Commercial Casualty Insurance Company* case. As hereinafter pointed out, the Government could not, under the language

of art. 9 of the contract in this case, terminate the contractor's right to proceed through the exercise of the choice given under the first option after the completion date had passed. If, therefore, it did terminate the right to proceed within the meaning of art. 9, it acted under an option which expressly contemplated only continuous delay by the contractor after the completion date and not his abandonment of the work by refusing to continue with it to completion.

I am of opinion that under the rationale of the opinion in the *American Surety Company* case, the Government is entitled to recover liquidated damages in this case from the completion date to the date on which the work could have been completed by the Government by the exercise of reasonable diligence, together with actual excess costs to the Government upon completion of that portion of the contract remaining incomplete after the total breach of the contract by the contractor and the refusal of the surety to complete the work. The majority opinion, like plaintiff's argument, emphasizes the reference in the Government's notice of June 17 to art. 9 and gives little, if any, effect to the statement in that notice of the ground on which the notice was based, i. e., that the contractor had given notice that it would not proceed further with the work when ordered to do so by the contracting officer.

This conclusion is in conflict with the decision in *Continental Casualty Co.* v. *United States*, 113 Fed. (2d) 284, 286, affirming 29 Fed. Supp. 598; certiorari denied November 12, 1940, *Continental Casualty Co.* v. *United States*, 311 U. S. 696. In that case, which involved a contract for certain levee construction work, the completion dates for the items of levee work called for were February 27, 1933, as to certain items and September 25, 1933, as to other items. The contract provided for liquidated damages at the rate of twenty dollars a day for delay of the contractor beyond the time fixed for completion. Although the progress of the contractor was slow and unsatisfactory, the contracting officer did not terminate its right to proceed but gave the contractor every assistance through repeated suggestions and instructions in an effort to facilitate completion of the work by the time stipulated in the contract. The work was not completed

on time, but the contractor continued with the work as required by art. 9. The contracting officer continued with his suggestions and instructions as before and indicated no intention of terminating the right to proceed to completion. The contractor continued construction until March 16, 1934, nearly thirteen months after the completion date of certain items and nearly six months after completion date of the other items, at which time it filed a petition in bankruptcy, which, as found by the District Court (29 Fed. Supp. 598, 599), operated as a default of the contractor under the terms and conditions of the contract. On the following day, March 17, 1934, the contracting officer officially placed the contractor in default on the ground stated and notified it that its right to proceed with the work was terminated under the provisions of art. 9. Art. 9 of course contained no reference to such a default by the contractor. At the same time this notice was given to the contractor, the contracting officer notified the surety of the default by the contractor and asked the surety whether or not it desired to complete the work in accordance with the terms of the original contract. The surety replied May 22 stating that it desired to complete the work in accordance with the terms of the contract, but it did not do so. The surety did not at any time commence operations under the contract. Instead, on May 2, 1934, the surety notified the Government that it declined to complete the contract, claiming that it had been prejudiced by the delay. The Court found that the Government had caused no delay. The Government thereupon advertised for bids for completion of the work left incomplete by the original contractor, and a contract for completion was let September 11, 1934. The several items of work remaining unfinished under the original contract were completed October 5 and 22, 1934, and October 22, 1935.

The Government brought suit to recover from the surety liquidated damages in the amount of $620 for delay from the contract completion date to date on which the contractor, while proceeding with the work, defaulted under the contract by the filing of a petition in bankruptcy and, also, the actual excess costs of completing the work of $26,154.70. Both the District Court and the Court of Appeals held that the Gov-

ernment was entitled to liquidated damages and excess completion costs claimed on the ground that at the time the contractor defaulted in performance of the contract work, by filing a petition in bankruptcy, and the contracting officer declared it in default on that ground, the rights of the Government and the liability of the surety under the contract immediately became fixed.

Under the facts in the *Continental Surety Company* case I am of opinion that the Government might have claimed, as it does claim under the facts in this case, the liquidated damages specified in the contract for delay from the date fixed for completion until the work was completed; and, also, in addition, the actual excess costs to the Government of completing the unfinished work after default of the contractor in a manner and under circumstances not contemplated by art. 9 and not due to any act of the Government. This rule was approved under a liquidated clause of a contract between private parties where the contractor, and not the other party, stopped work before completion. *Southern Pacific Co.* v. *Globe Indemnity Co. et al.*, 21 Fed. (2d) 288, 290, 291.

What the Government did in the instant case was in substance and effect no different from what it would normally have done had art. 9 simply provided for a completion date and for liquidated damages thereafter until completion by the contractor if, before completion the contractor had stopped work and abandoned the contract. In such a case notice from the Government holding the contractor in default for *refusing* to complete would not be the exercise of a choice but the normal action by one party where the other is guilty of a total breach. The notice by the Government terminating the right to proceed which will constitute a waiver of liquidated damages under art. 9 must be a notice which is initiated by the Government under a choice given it and not the result of action first taken by the contract which had the effect of terminating its own right to proceed. The general rule is that where one party to a contract is guilty of a partial breach, the other party may elect to continue performance to completion and sue for damages, liquidated or otherwise, depending upon the terms

of the contract. Under the terms of the standard Government contract if the Government elects not to perform further because of a partial breach due to delay (and failure to complete on time or to make satisfactory progress thereafter is only a partial breach) and terminates the right of the contractor to proceed to completion, except for which the contractor would be required to complete, the Government by the provisions of the contract which provides for all excess costs in such a case waives its right to liquidated damages, but may claim actual damages for failure to complete on time.

In the instant case the facts show that on January 6 and May 11, 1937, the contractor, Elkas Construction Co., Inc., on whose bond plaintiff was surety, was 59 days late with the two items of levee construction work called for by the contract on the basis of delay properly chargeable to the contractor, and this is admitted. The contracting officer authorized the contractor to suspend operations on January 6, 1937, as contemplated by art. 9, because of unusual flood conditions. Although the contractor was 59 days late, the contracting officer shortly prior to May 11, 1937, instead of terminating the contractor's right to proceed ordered the contractor to resume operations and proceed with completion of the work. Instead of resuming operations upon receipt of this notice and proceeding to complete the work as it had agreed in arts. 1 and 9, the contractor on May 11 declined to proceed further, abandoned the work, and notified the contracting officer that because of financial difficulties it was unable to proceed with the work or any remaining part thereof to completion. Thereupon, instead of saying anything to the contractor, the contracting officer by his letter of May 17, 1937, to the surety treated this notice of the contractor as a default not due to any action by the Government under art. 9 and notified the surety that the contractor had "defaulted the contract." If the surety had elected to complete, no notice to the contractor would have been necessary. However, the surety declined to complete, and on June 17 (the contractor in the meantime having indicated no intention of resuming operations, the contracting officer notified the contractor and the surety that

their right to proceed with the work had been terminated on the ground that the contractor had advised that it was unable to complete and the surety had declined to complete. In the majority opinion the court says that "Upon the contractor's default in the performance of its contract the defendant terminated its right to proceed and let a contract to another contractor for completion of the work." This is an incomplete statement. What happened was that the contractor committed a total breach of the contract when it notified the Government that it could not complete the work. The contractor and not the Government therefore terminated the right to proceed. The Government simply confirmed this. Art. 9 did not give the contractor this right. It could not thereby void liquidated damages.

Although the contracting officer in this notice stated that the right of the contractor and the surety to proceed was terminated under art. 9, this reference to art. 9 cannot be taken literally because both the contractor and the surety had already refused to proceed and the contracting officer specifically qualified his reference to art. 9 by stating that his action had been taken because the contractor had defaulted the contract. I think it is clear under the plain language of the contract that this was not a termination by the Government of the right of the contractor to proceed for failure to complete on time, or for lack of diligent prosecution of the work as was contemplated by art. 9, and as would constitute a waiver by the Government of liquidated damages of twenty dollars a day on each item of work until completion after the Government elected to complete, and, having so elected, proceeded with reasonable promptness. If the Government had not elected to have the work completed, as it clearly had the right to do, *United States* v. *U. S. Fidelity and Guaranty Co.*, 236 U. S. 512, 526, it seems clear from the facts that under the notice holding the contractor in default the Government would be entitled to the stipulated damages for 59-days' delay of the contractor to date of its default on May 11, 1937. The fact that it elected to complete, as it also had the right to do, does not change the rule.

By abandoning the contract, the contractor and its surety

in any event became liable at least for $1,180 liquidated damages for the 59-days' delay to January 6, 1937, and the excess costs of completion and actual damages sustained by reason of delay until the Government completed the unfinished work. The majority opinion does not decide whether the Government is entitled to actual damages for delay where the right to proceed has been terminated, but we have consistently held that where the Government terminates the right to proceed strictly under the authority and provisions of art. 9, because of delay while the contractor is continuing with construction and elects to complete the work, the Government is entitled to recover actual damages for delay properly chargeable to the contractor from the contract completion date to date of termination, as well as actual damages to date of completion; and, also, the actual excess costs of completion over the original contract price. *John M. Whelan & Sons, Inc.* v. *United States*, 98 C. Cls. 601; *Modern Industrial Bank* v. *United States*, C. Cls. No. 45602 (101 C. Cls. 808). The same rule was approved and applied in *American Surety Co.* v. *United States*, 136 Fed. (2d) 437, 439. The question raised in the present case by the Government did, under the facts, lurk in the record in the *John M. Whelan & Sons, Inc.*, case, *supra*, but it was not raised or considered.

Under the standard construction contract in suit, the contractor is nowhere given the right to terminate his own right to proceed and thereby escape liquidated damages merely because the Government thereafter sends him a notice holding him in default. Before the contractor can escape paying liquidated damages the Government must take such action as will constitute a waiver of its right to claim liquidated damages. The options to terminate the contractor's right to proceed if he (1) does not make such progress as will insure completion on time or (2), fails to complete the work on time, or (3), thereafter fails to make satisfactory progress while he is continuing the work, are by the plain terms of the contract given *only* to the Government. In this case the Government did not at any time exercise any of these options within the meaning and purpose of

the language of art. 9, and at no time prior to the contractor's default, in a manner not contemplated by the contract, did the Government indicate that it had any intention of terminating the right of the contractor to proceed. I think it is an unwarranted interpretation of art. 9 to say that where the Government notifies the contractor, after the latter has abandoned the contract, that his right to proceed is terminated, it waives or loses its right to stipulated damages. In such a case the Government does not exercise a choice, but simply accepts a situation brought about by the action of the contractor. Art. 9 contemplates that the Government must on its own initiative exercise a choice before it will be held to have waived its right to claim liquidated damages. Art. 9 gives the Government three grounds for terminating the contractor's right to proceed and I think all the grounds contemplate the exercise of that right while the contractor is continuing with the work, not after he has voluntarily stopped and notified the Government that he cannot complete it. The fact that the contractor in such a case may ask the contracting officer to terminate his right to proceed is immaterial so far as the right of the Government to liquidate its damages under art. 9 is concerned. When the contractor notifies the Government without justifiable cause that he cannot proceed with the work and abandons it, as this contractor did, he has committed a total breach of his express agreement set forth in art. 9 to the effect that if the Government does not terminate the right to proceed he will continue with the work and complete it. This, of course, can mean only that if after consideration of the continuous delay after the contract completion date the Government does not exercise its option to terminate the right to proceed, the contractor cannot do so. The contractor probably hoped to escape liquidated damages, but the contracting officer based his notice of June 17 on the default of the contractor and not strictly under art. 9. This is made clear by the fact that the contracting officer sent the notice only after the surety had declined to complete and advised the surety, as well as the contractor, that its right to proceed was terminated. Certainly this was not required under art. 9.

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The first option, or choice, to terminate given the Government by art. 9 is: "If the contractor *refuses* or *fails to prosecute* the work *with such diligence* as will insure its completion within the time specified in art. 1, or any extension thereof." The second is: If the contractor "*fails* to complete said work within such time." These two grounds are separate and distinct. When the date for completion has passed, the Government no longer exercises the choice given it under the first ground. The second ground is not a part of the first. The first ground for termination contemplates not that the contractor can commit a total breach by abandoning the work and refusing to proceed at all with it, thereby escaping liquidated damages if the Government is unable to complete the work before the contract date for completion, but a refusal or failure of the contractor while continuing the work to make such progress or to prosecute it with such diligence as will insure the timely completion of the work. I think the word "refuses" used in the first sentence of art. 9 contemplates a refusal of the contractor to comply with a demand or instruction of the Government for better progress or greater diligence.

The second ground for termination is simply stated by the contract to be a *failure* of the contractor to complete on time. This is a continuing option of the Government which, if satisfactory progress is not made, it may, as a third choice, exercise or not as it may choose. If the work is not completed on time and the Government does not terminate the right to proceed when the completion date arrives, the Government continues thereafter to have the right to terminate for continuous delays or unsatisfactory progress.

To say that a contractor in order to escape liquidated damages might desire to have his right to proceed terminated and make such poor progress as to force the Government to terminate it, is immaterial; that was not what happened here. In such case the Government might elect to terminate and claim actual damages for delay if it could prove them, or it might elect not to terminate because of poor progress deliberately, or otherwise, and hold the surety

for liquidated damages. The contract here involved called for levee work which the Government probably would have considered not to be of sufficient urgency to justify termination of the contractor's right to proceed, because of poor progress, and, since the Government was adequately protected by the liquidated damage clause and bond, it could and doubtless would have permitted the contractor to continue until it had completed the work. The surety was always in a position to step in and protect its interests by assisting the contractor. *Magoba Construction Co.* v. *United States*, 99 C. Cls. 662.

Under the facts in this case it seems clear to me that the Government did not terminate under any choice within the meaning of art. 9; that article expressly provided that the contractor must continue with the work after the completion date had passed—the exact language being that "If the Government does not terminate the right to proceed, the contractor shall continue with the work." Under this provision the contractor expressly agreed not to abandon the work before its completion, but to continue with it and complete it even though late. In this case the contractor refused to comply with this provision and, by such refusal, it and the surety became liable for the stipulated liquidated damages to date of abandonment and until such date as the Government might, by acting with reasonable promptness, have completed the work, and also for excess costs of completion. A contractor cannot escape liquidated damages by claiming a waiver based on its act of abandoning the work or declining to proceed with it as required by the contract and after being ordered to do so.

In these circumstances the letter of June 17, from the contracting officer was the usual notice required by one party when the other party is guilty of a total breach of the contract. Prior to the contractor's default in a manner not contemplated and authorized by the contract it had only partially breached the contract and the Government had elected to proceed with performance until completion by the contractor and to hold it and the surety for liquidated damages as therein provided. In order to constitute a waiver of

liquidated damages the termination of the right to proceed must, as I have said, arise from an act of the Government which brings about a cessation of work by the contractor and prohibits him from proceeding further while the contractor is proceeding with construction and has indicated no intention of abandoning the work. To hold otherwise would be contrary to the express terms and conditions of art. 9. It is highly improbable, to say the least, that the parties to the contract could have intended by the language of art. 9 to put it in the power of the contractor, by an absolute breach, to exempt itself from payment of agreed liquidated damages whether the Government did or did not elect to complete. After the contractor had abandoned the work and the surety had declined to complete, no further notice was necessary; the fact that notice of default was subsequently given did not change the previously existing and fixed rights and liabilities of the parties under the contract. If, after the contractor's notice of abandonment and after the Government had notified the surety that the contractor had "defaulted the contract," the contractor had come back and asked permission to be allowed to resume operations and complete, its right to do so would have depended entirely upon the then willingness of the Government to permit it to do so and not upon any right which the contractor could claim under art. 9 or any provision of the contract.

At the time the contractor decided not to perform further and notified the Government it could not complete the contract, the rights of the parties became fixed without any further action on the part of the Government other than notice that it held the contractor in default. That, I think, was the notice which was intended and which was in fact given by the Government. *United States* v. *U. S. Fidelity & Guaranty Co.*, 236 U. S. 512; *Board of Education of City of Asbury Park* v. *Maryland Casualty Co. of Baltimore, Md.*, 27 Fed. (2d) 20; *Continental Casualty Co.* v. *United States*, 113 Fed. (2d) 284, 285. See, also, *The Philadelphia, Wilmington, and Baltimore Railroad Co.* v. *Howard*, 13 How. 307, 339–341; *United States* v. *Quinn*, 99 U. S. 30, 32; *United States* v. *O'Brien*, 220 U. S. 322, 328.

On the question of the amount of liquidated damages to which the Government is entitled under the facts in this case, it appears that from the completion dates for the two items of levee work in question to January 6, 1937, a delay of 59 days was properly chargeable to the contractor and that the liquidated damages to that date amount to $1,180. If the Government is not entitled to this amount it can recover only the engineering and inspection costs for this period since the nature of the work was such that it is impossible to prove other actual damages, as the parties had stipulated.

With reference to delay thereafter in getting the unfinished work completed, for which delay the Government also claims liquidated damages, it appears that the Government did not advertise for bids for completion until September 20, 1937. This was eighty-five days after the notice of June 17, 1937. I think this was an unreasonable delay in the circumstances. The Government acting with reasonable promptness should have been able to advertise for bids for completion within ten days after June 17, 1937, or by June 27. Bids were received October 4, 1937, and the new contract for completion was awarded to Jones & Shepard October 22, 1937. This contractor proceeded with all possible diligence and completed the work on item L–275 on November 9, 1937, and that on item R–365–A on December 26, 1937.

I am of opinion that the defendant is entitled to recover liquidated damages at the rate of twenty dollars a day, in addition to the amount of $1,180, for delay from May 11, 1937, on each item of work, until the dates on which the two items of work were completed, as above stated, less 85 days from June 27 to September 20, 1937, during which period the Government delayed unreasonably in readvertising for bids for completion of the work. The delay in completion properly chargeable to the contractor and its surety was therefore 97 days with respect to item L–275, completed November 9, 1937, and 144 days with respect to item R–365–A, completed December 26, 1937. The amount of liquidated damages due under the contract for the 97 days' additional delay chargeable to the contractor with respect to L–275 is $1,940, and the liquidated damages so due for the 144 days'

delay with respect to item R-365-A is $2,880. The total liquidated damages to which the Government is entitled under the contract for the total delay in completion beyond the date fixed by the contract properly chargeable to the contractor and the surety is, therefore, $4,060.

The parties have stipulated that the actual excess cost of completion over the original contract price was $514.02. The Government was entitled under the contract to charge the plaintiff, as surety on the contractor's bond, this amount of $514.02 in addition to the liquidated damages of $4,060 above mentioned, which makes a total of $4,574.02. Since the Government was entitled in the circumstances to charge the agreed liquidated damages for all the delay in completion properly chargeable to the contractor and surety, it was not entitled to charge them by way of actual damages with expenditures for engineering and inspection costs amounting to $1,690.80, which costs would have been incurred in any event if the contractor had completed the work within the same period of time the Government took to complete it after it had relet the contract. The Government does not now claim these inspection and engineering costs of $1,690.80 in addition to the liquidated damages to date of completion, but claims only the actual excess completion costs of $514.02. If the Government is not entitled in the circumstances to the liquidated damages after May 11, 1937, it is, of course, entitled to the inspection and engineering costs of $1,690.80 as the only actual damages it can prove, in addition to the excess costs of completion. Since the amount of liquidated damages of $1,180, excess costs of completion of $514.02, and the engineering and inspection costs of $1,690.80, totaling $3,384.82 (finding 13), which the Government charged to plaintiff under its bond, are $1,189.20 less than it was entitled to charge under the proper interpretation of the contract, the plaintiff is not entitled to recover the $1,180 liquidated damages included in these charges. Plaintiff's petition should therefore be dismissed, and judgment rendered for defendant for $1,189.20.

Although the Government has not filed a formal written counterclaim, it does expressly claim in its brief and oral argument liquidated damages at the contract rate to the

Syllabus

date on which the two items of work were completed by Jones & Shepard. We have jurisdiction under section 145 of the Judicial Code to enter judgment in favor of the Government for the amount to which it is still entitled under the contract without the filing of a formal written counterclaim. *Chicago, Burlington & Quincy R. R.* v. *United State*, 73 C. Cls. 250, cert. den. 287 U. S. 599; *Vulcanite Portland Cement Co.* v. *United States*, 74 C. Cls. 692; *American Sanitary Rag Co.* v. *United States*, 84 C. Cls. 417.

If a formal counterclaim is deemed desirable or necessary, the defendant should have leave to amend its general traverse by the filing of a formal counterclaim to conform to the proof, and to the claim made in its brief and oral argument. No statute of limitation precludes the Government from filing a formal counterclaim at this time.

Judgment should therefore be entered in favor of the Government and against the plaintiff for $1,189.20, and costs.

THE MASSMAN CONSTRUCTION COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 45765. Decided January 8, 1945. Plaintiff's motion for new trial overruled March 5, 1945]*

On the Proofs

Government contract; error in preparation of bid discovered and disclosed before signing of contract.—Where the plaintiff, a contractor, in response to the Government's advertisement for bids on a jetty project, submitted a bid which was the lowest bid that was submitted and which was accepted; and where, thereafter, it was discovered by plaintiff's officers that in the preparation of the bid an item, representing the value of the use of equipment, had been omitted so that the bid which was submitted was lower by that amount than it would have been but for that omission; and where the omission was disclosed to the Government's representatives, who declined plaintiff's request to change its bid; and where plaintiff signed the contract "under protest", and completed the contract in accordance with its terms, and received payment therefor; it is *held* that plaintiff is not entitled to recover.

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*Plaintiff's petition for writ of certiorari pending.

Same; neither unilateral nor mutual mistake to justify reformation of contract.—Where at the time the contract was awarded to the plaintiff, pursuant to its bid, and at the time it signed the contract, it had become aware of the mistake in its bid; and where at that time the Government was also aware of the plaintiff's claim that it had made a mistake in its bid; there was neither (1) mistake of fact on the part of the plaintiff and unconscionable conduct on the part of the Government or (2) mutual mistake of fact which would justify that the contract should be reformed and enforced as reformed.

Same; case of Rappoli v. United States is distinguished.——The instant case is distinguished from the case of *Rappoli* v. *United States*, 98 C. Cls. 499, in the respect that in the *Rappoli* case the court found that concurrently with the signing of the contract, the Government's agents promised the contractor that, upon the fulfillment of certain conditions that were found by the court to have been fulfilled, the mistake would be corrected.

The Reporter's statement of the case:

Mr. Temple W. Seay for the plaintiff. *Mr. Phil D. Morelock* was on the briefs.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Missouri corporation with its principal place of business in Kansas City, Missouri. It is and since 1916 has been engaged in the general contracting business which has included both private and Government contracts. During the past fifteen years its work has largely been on contracts with the Corps of Engineers, United States Army, and such contracts have amounted to some $60,000,000. These contracts have been carried out by the plaintiff and accepted by the defendant's representatives without substantial controversy.

During the period involved in this suit, H. J. Massman, Sr., was president of plaintiff, H. J. Massman, Jr., vice president, and George E. Owens, general superintendent and estimator.

2. October 23, 1940, the United States Engineer Office, New Orleans, Louisiana, advertised for bids which were to be opened at 2 p. m. November 7, 1940, for furnishing all labor and performing all work for repairing the existing rubble-

mound East jetty at Calcasieu Pass, Louisiana. The Invitation for Bids stated that the work was being advertised under three separate invitations as follows (alternate (b) being the one on which the contract here in question was awarded):

(a) For furnishing all labor and materials and performing all work for repairing and extending the jetty;

(b) For furnishing all labor and materials except stone which was to be furnished by the Government, and performing all work for repairing and extending the jetty;

(c) For furnishing f. o. b. cars at producer's quarry approximately 220,000 tons of stone.

The contract was to be awarded to one bidder under Invitation (a) set out above, or to two bidders under Invitations (b) and (c) whichever was found to be most advantageous to the Government.

3. The bids invited were unit price bids and the Invitation stated—

> The quantities of each item of the bid, as finally ascertained at the close of the contract, in the units given and the unit prices of the several items stated by the bidder in the accepted bid, will determine the total payments to accrue under the contract. The unit price bid for each item must allow for all collateral or indirect cost connected with it.

The estimated quantities of stone required to complete the contract were 48,000 tons of riprap, 102,000 tons of core stone, and 70,000 tons of cover stone. The work involved first the laying of a mat of riprap stone on the bed of and extending into the Gulf of Mexico and the building of a core of stone on the mat upward to the low water level. The cover stone was to be placed over the core stone.

A bid bond was required in an amount not less than ten percent of the total amount of the bid and the successful bidder was required to execute the standard form of construction contract.

4. During the latter part of October 1940 the Invitation for Bids referred to above came to the attention of plaintiff. Plaintiff had just completed a project at Greenville, Mississippi, and was nearing the completion of a project at Beaumont, Texas, from which projects equipment of a type suit-

able for the work covered by the Invitation for Bids was about to become available. At that time Owens was out of Kansas City in connection with work on one of these projects. Upon the return of Owens to Kansas City on or about November 4, 1940, and after consideration of the nature of the project and the equipment which plaintiff would have available, plaintiff decided to submit a bid. Owens had been in the employ of plaintiff for over ten years, first as foreman, then as superintendent of bridge construction, and at this time as general superintendent and estimator. Prior to his coming with plaintiff he had had broad experience in the construction field. During his employment with plaintiff he had been entrusted with estimating the cost of projects, preparing bids for submission with respect thereto, and in the supervision of the projects where bids were accepted. Plaintiff's officers had confidence in Owens' ability and he was often entrusted with the job of making estimates and submitting bids without supervision or check by them.

5. At the time the decision was reached to submit the bid the scope of the work to be accomplished, organization to be used, method to be adopted, and the kind, suitability and availability of equipment were discussed. In the discussion it was concluded that plaintiff would have sufficient equipment available to accomplish the work and rental charges therefor to be used in preparing the bid were discussed but the amount of such rental charges was left to Owens' judgment.

It was decided to have Owens proceed to New Orleans and prepare the bid rather than undertake to prepare it in Kansas City because of several essential factors which could more readily be determined in New Orleans, such as local labor rates, fuel costs, freight rates on stone and quotations from local stevedores.

6. Owens left Kansas City for New Orleans by the most direct route on the morning of November 5, 1940, which afforded him ample time within which to make his estimates and prepare the bid for submission on the afternoon of November 7, 1940. Plaintiff's action in contemplating the submission of the bid immediately prior to the time for the

opening followed the general policy in the construction industry where the bidders seek to have the latest information on subcontractors' bids and labor and material costs which are constantly changing.

7. Owens arrived in New Orleans on the morning of November 6, 1940, and began the preparation of plaintiff's estimates for the bid. In addition to the actual computation of the estimates on the alternates set out in the bid, it was necessary to learn about freight rates on stone, unloading costs, and material and labor costs.

Because of the alternates in the invitation and the conditions that existed, there were several methods of figuring the bid. Owens worked steadily throughout November 6, 1940, with only time out for meals, collecting the necessary information, interviewing various individuals, and making his calculations. Since a major factor in the cost of doing the job was the type and amount of equipment to be used, on the morning of November 6, 1940, he first calculated the equipment charge on the customary estimate sheet (herein referred to as first sheet) used by plaintiff as follows:

MASSMAN CONSTRUCTION COMPANY

KANSAS CITY, MO.

Computation Calcasieu Pass Jetties. Date 11-7-40. Computed By GEO Checked By______Contract______.

EQUIPMENT

1 Towboat	900.00 per mo.	
1 "	600.00	
10 Barges	1,800.00	
1 Derrick Barge	750.00	
1 Whirley	750.00	
1 Launch	200.00	
	5,000.00×16 mo's=80,000.00	
2 Rock Buckets	3,000.00	
Misc. Tools & Sup	2,500.00	
Equip. Repair	2,500.00	
		8,000.00
Total Equip. Cost		$88,000.00

While that sheet was prepared on November 6, 1940, it bore the submission date November 7, 1940, as did the other estimate sheets. After having prepared the equipment estimate, Owens then on a similar form prepared his estimate (herein referred to as second sheet) of the labor costs of placing the stone together with his costs of supervision, etc., as follows:

MASSMAN CONSTRUCTION COMPANY

KANSAS CITY, MO.

Computation Calcasieu Pass Jetties. Date 11-7-40. Computed by GEO Checked by ______ Contract ______

Place:

1 Foreman	@1.00
1 Operator	@1.25
1 Fireman	@ .50
2 Pilots	@2.50
1 Engineer	@1.00
2 Deck Hands	@1.00
12 Laborers	@4.80
	12.05

$12.05×16=$192.80/day
$192.80×400=$77,120.00 or .35/ton

Supervision	10,000
Fuel	6,000
Ins	25,000
Bond	7,000
Trav. Exp.	1,000
K. C. Office	5,000
Misc. Exp	2,000
Contingencies	11,000
Move In & Out	8,000
	75,000
Say .34	
Total Cost	.41
	.30
	.35
	.34
	1.40

On a third sheet Owens prepared the labor costs of unloading and towing as follows:

MASSMAN CONSTRUCTION COMPANY

KANSAS CITY, MO.

Computation Calcasieu Pass Jetties. Date 11-7-40. Computed By G. E. O. Checked By ______ Contract ______.

Unload:

Foreman	$1.00 per hr.		
Operator	1.25		
Fireman	.75		
20 Laborers, @ .75	15.00		
	18.00 x 16 hrs.		$288.00

700 tons @ 288.00= .41/ton

Tow:

3 Pilots, @1.25	3.75
3 Engineers, @ 1.25	3.75
3 Cooks, @ 1.00	3.00
3 Deck Hands, @ .75	2.25
	12.75/hr.

102.00/day for 500 days $51,000

say________________ .25

Plus fuel @ .05/ton________________

Total for towing________________ = .30/ton

8. Owens completed the preparation of the three estimate sheets referred to in the preceding finding at approximately 1 a. m. on the morning of November 7, 1940, at which time when he came to retire he gathered together the varied assortment of working papers, including the three completed estimate sheets, which were scattered over the bed in his hotel room and on a small writing table, and placed them in his brief case without any special arrangement. What remained to be done on the following morning was to summarize the results of his calculations contained on the three estimate sheets set out above, transfer the results of that summary to his bid form, and secure and prepare a sample of stone which had been sent to him by express.

9. On the following morning, November 7, 1940, after having procured the requisite sample of stone and prepared it for submission with his bid, Owens, in removing the papers from his brief case, inadvertently failed to remove the sheet upon which he had determined the equipment charge, and

prepared the summary for the purpose of his bid on a fourth sheet by using the second and third sheets but without including therein any charge for equipment as shown on the first sheet. The summary sheet read as follows:

MASSMAN CONSTRUCTION COMPANY
KANSAS CITY, MO.

Computation Calcasieu Pass Jetties. Date 11-7-40. Computed by G. E. O. Checked by ______ Contract ______

Contract #125—Bid #2

	Cost	Add	Unit Bid	Total Bid
1 Rip Rap Stone—48,000 T @ 1.40	$67,200.00	$16,800.00	$1.75	$84,000.00
2 Core Stone—102,000 T @ 1.40	142,800.00	25,500.00	1.65	168,300.00
3 Cover Stone—70,000 T	98,000.00	17,500.00	1.65	115,500.00
	308,000.00	59,800.00		367,800.00

The column headed "Cost" and showing a total of $308,000 is made up of salaries, wages, and other expenses as outlined on the second and third sheets prepared by Owens and set out in finding 7. The column headed "Add" in the total amount of $59,800 is the amount of expected profit which Owens included. The column headed "Unit Bid" is the unit cost for stone as used in the "Cost" column plus the unit profit used for the purposes of determining the amount shown in the "Add" column. The fourth column in the total amount of $367,000 represents the amount which Owens submitted as plaintiff's bid for the contract at the unit prices stated.

10. From the summary sheet referred to in the preceding finding, Owens prepared and submitted on the bid form supplied by defendant and previously signed by plaintiff the bid as follows:

Item	Designation	Unit	Quantity	Unit Price	Amount
1	Riprap stone	Ton	48,000	$1.75	$84,000.00
2	Core stone	"	102,000	1.65	168,300.00
3	Cover stone	"	70,000	1.65	115,500.00
	Total				$367,800.00

On the same page Owens listed the plant to be used on the work as one 20-ton whirley, one 15-ton derrick barge, and for the remainder of the equipment stated generally: "Necessary number of steel barges and tow boats and other equipment as required."

11. A charge for equipment to be used on this job was one of the elements of cost which should have been included in the preparation of the estimates for the bid. The equipment set forth in the estimate sheet which was prepared by Owens but was not considered by him in preparing plaintiff's bid was reasonable and necessary for the prosecution of the proposed project and the proposed charges therefor contemplating the use of its own equipment were reasonable and proper. The cost of renting such equipment instead of using its own equipment would have been substantially in excess of the $88,000 computed by Owens on his estimate sheet. The two major items of cost entering into plaintiff's contract were labor and equipment and, as shown from the estimate sheets, labor constituted the larger item.

12. Owens filed the bid in the office of the District Engineer at New Orleans together with bond in the amount of $200,000 at approximately 1:30 or 1:45 p. m. November 7, 1940, and the other bidders filed their bids at or about the same time. Shortly thereafter in Owens' presence and in the presence of other bidders, the bids were opened at 2 p. m. on November 7, 1940, and read aloud by the District Engineer who was also the Contracting Officer. At the same time the Government estimate was also read. The bids and the Government estimate on the alternate here in controversy were as follows:

Massman Construction Co. (plaintiff)	$367, 800. 00
Estimated Government Cost	453, 601. 00
Badgett Construction Co	620, 400. 00
D. M. Picton & Co., Inc	798, 600. 00
W. Horace Williams Co	935, 000. 00

The Government estimate was an estimate of the cost of the work to the Government if done by the Government with its plant and forces. It included items for supervision, surveys, and inspection in the amount of $53,200 which were not included in the estimates of contractors and which may ac-

cordingly be deducted from the Government estimate for the purpose of making a cost comparison of that estimate with the estimates of the contractors. A statute in effect at that time provided that (40 Stat. 1290, 33 U. S. C. 624):

> No part of the funds herein or hereafter appropriated for works of river and harbor improvement shall be used to pay for any work done by private contract if the contract price is more than 25 per centum in excess of the estimated cost of doing the work by Government plant.

One purpose of a Government estimate is to enable the Government to determine after the bids are received whether it would be more advantageous to the Government to accept one of the bids or to carry out the work itself and another purpose is to determine whether the acceptance of a given bid is within the statute quoted above. In the case of the bids submitted at this hearing only the bid of plaintiff came within the 25 percent limitation provided by the foregoing statute.

13. On the alternate (a) for both furnishing the stone and performing the work, three bids were received, the lowest of which was submitted by plaintiff. These bids were as follows:

$1,129,200
1,489,400
1,540,000

On the alternate (c) contained in the same Invitation for Bids for only furnishing the stone, five bids were received as follows, of which the bid in the amount of $693,000 was submitted by plaintiff:

$603,700
656,600
671,000
693,000
715,000

No contracts were awarded on alternate invitations (a) and (c).

14. Immediately after the opening of bids, Owens had a conference with the District Engineer at the latter's request in regard to the procedure which plaintiff was going

to follow in carrying out the work, when plaintiff would start the work, the sufficiency of the equipment which plaintiff proposed to use, and other matters of a similar nature. In view of the amount of the Government estimate and the wide disparity between plaintiff's bid and the other bids, Owens had become concerned over the correctness of his bid but he did not at this conference with the District Engineer make any claim of mistake or ask to withdraw his bid. Owens' feeling at the time was that if an error had been made it had been in his using poor judgment in estimating the job. Neither the District Engineer nor his assistant, both of whom were present at the opening of bids and at the conference with Owens and had had extended experience in matters of this nature, had any thought that a mistake had been made in plaintiff's bid and no claim of mistake was made or called to their attention. The unit prices bid by plaintiff were not substantially different from unit prices which were bid and accepted for similar work in this area some sixteen months prior to the opening of these bids. The bid of the successful bidder on that other contract was, however, $798,600 for the work here in question.

Immediately after the conference with the District Engineer, Owens telephoned plaintiff's president in Kansas City. When he advised the latter of the bid submitted, the Government estimate, and expressed fear that an error had been made, plaintiff's president also expressed concern and instructed Owens to check his figures which Owens said he had already done and which he thereafter did on various occasions as will hereinafter appear.

15. Owens left New Orleans on the afternoon of November 7, 1940, for Beaumont, Texas, where plaintiff had a bridge project under construction and after two or three days at that place where he was busily engaged he returned to Kansas City on Sunday morning, November 10, 1940. Between the time of Owens' arrival in Kansas City and the morning of November 18, 1940, plaintiff's president was out of town the greater part of the time and when at his office did not find an opportunity to go over the bid with him. However, during that period as well as prior thereto Owens made various checks of his estimates on the Calcasieu Pass without finding

an error. It did not then occur to him that there could be any mistake about the equipment item and his checks did not include that item.

On the morning of November 18, 1940, Massman, Sr., and Massman, Jr., president and vice president, respectively, and Owens had a conference in Massman, Sr.'s, office for the purpose of reviewing the bid in question. In discussing the bid and the work to be done, Massman, Sr., inquired as to the list of equipment which Owens proposed to use. At that time Owens had before him various sheets which he had used in preparing his bid, but when he came to look for the equipment he found that he did not have a list of such equipment. He said he knew that he had computed a charge for equipment and went into his office where after some search he discovered the missing sheet in a separate compartment of his brief case, such sheet being that referred to in finding 7 as the first sheet prepared by Owens and as showing total equipment cost of $88,000. That brief case was the one which he had in New Orleans on November 7, 1940. It was the ordinary zipper type of brief case with separate compartments in one of which the missing sheet was found.

16. Upon discovering that a charge for the use of equipment had not been included in its bid and upon the advice of its attorney, plaintiff sent a letter to the United States Engineer Office, New Orleans, Louisiana, November 20, 1940, which read in part as follows:

> After bids were opened on the above work we checked our estimate sheets with a view of attempting to ascertain the reason, if any, for the great difference between our bid and that of the second bidder. In so checking we found that in making our bid we had unintentionally failed to include in our total cost the value of equipment rentals which should be charged against the job. This oversight occurred due to the fact that our equipment charges were carried on a separate sheet and in the compiling of our total costs the equipment sheet was not included, due to an oversight on our part. The amount of equipment charges on this sheet which should have been added to our bid totaled $88,000, which amount was arrived at as per the attached certified copy of our estimate sheet.

> We regret that such an oversight occurred on our part, and although the fault was entirely ours, we request that the above amount be added to our bid before the contract is awarded. If this procedure cannot be followed we respectfully request that our bid be rejected, and our bid bond be released without penalty to either the surety company or ourselves.

The sheet referred to in that letter and enclosed therewith was the same as the first sheet referred to in finding 7.

17. After acknowledgment on November 25, 1940, of the receipt of plaintiff's letter of November 20, the District Engineer on December 18, 1940, advised plaintiff that its bid in the sum of $367,800 was accepted and in that letter made the following reply to plaintiff's claim of error in the bid:

> Reference is made to your letter of November 20, 1940, in which you alleged error in your bid under Invitation No. 614-41-125. You are informed that after due consideration your request for permission to change your bid is denied. You are advised that you have the right to file a claim with the District Engineer for submission through channels to the Comptroller General for further consideration. If you desire to exercise your rights further in this regard, it is suggested that you submit your claim promptly. You are further advised that any action that may be taken on a submitted claim will not in any way affect the requirements for normal procedure under the contract.

The contract and bonds were enclosed with the letter for appropriate execution.

18. On receipt of that letter, plaintiff's officers considered the advisability of declining to enter into the contract. In reaching a decision to sign the contract plaintiff considered the effect of the forfeiture of its bond and also as one of the main factors the effect which a failure to enter into the contract might have upon its relations with the Government. At that time plaintiff had considerable Government business and did not desire to injure its established good-will with the Government agencies with which it was dealing. In addition plaintiff was hopeful that by signing the contract and following the procedure referred to by the District Engineer in his letter quoted in finding 17, of filing a claim, the Govern-

ment would recognize the error and make appropriate correction.

19. On or about December 28, 1940, plaintiff executed the contract to "furnish the plant, labor and perform the work" for repairing and extending the jetty in question as described in the specifications for the consideration of the unit prices set out in its bid as shown in finding 10. December 28, 1940, plaintiff forwarded to the District Engineer the executed contract together with the requisite bond, a written protest, and a letter to the Comptroller General. The written protest read as follows:

> This contract and the bond securing its performance are signed by the contractor, The Massman Construction Company, under protest, said contractor hereby reserving all of its rights in the matter and asking for relief on account of error and mistake in its bid due to the inadvertent omission of charge for use and rental of equipment; due notice of which error and omission was given on November 20, 1940, by the contractor to the District Engineer, United States Engineer Office, New Orleans, Louisiana, before acceptance thereof was made.

The contract was dated December 18, 1940, and, after having been signed by the Contracting Officer, it was approved by the Division Engineer, Corps of Engineers, January 8, 1941.

20. The letter to the Comptroller General enclosed with the signed contract recited the circumstances under which the rental charge for equipment of $88,000 had not been taken into account in preparing the bid and what had occurred as a result of protests. It had attached thereto various documents in support of the contentions advanced in the letter. Relief was requested as follows:

> WHEREFORE, The Massman Construction Company prays that relief be given it in this matter by allowing it the reasonable rental value of said equipment so inadvertently overlooked in this bid, for the reason that it would be unfair and unjust for the Government to avail itself of the use of same without compensating the contractor therefor.

The District Engineer at New Orleans forwarded plaintiff's claim to the Chief of Engineers on February 11, 1941,

for submission to the General Accounting Office. After conferences by plaintiff's representatives with representatives of the Corps of Engineers at which times various affidavits and supporting information were submitted, the Corps of Engineers on June 13, 1941, forwarded plaintiff's claim to the Comptroller General with certain factual statements with respect to the situation involved, and concluded that letter as follows:

> 8. In conclusion, it is the opinion of this office that there is doubt whether the contractor did in fact make the mistake, and that the estimate was prepared in an extremely careless manner. It is thought that it would not be unconscionable to require the contractor to perform the work at its bid price. The present record does not establish that the contractor would incur a loss in performing at the contract price. It is recommended that the claim be disallowed.
>
> 9. In the event the claim is allowed, it is recommended that payment be authorized on the basis of the increased unit price of $2.15 per ton for the riprap stone and $2.05 for the core stone and cover stone. The claimant has agreed to this modification.

21. September 9, 1941, the Comptroller General denied plaintiff's claim. His letter to the Secretary of War on that date with respect to his action on the claim concluded as follows:

> In view of the facts of record and the law applicable thereto, there appears no legal basis for modifying contract No. W–1096–eng–7350, dated December 18, 1940. Accordingly, payment for the work performed at prices in excess of those specified in the contract is not authorized.

22. Plaintiff commenced work under the contract in March 1941 and the work was accepted as complete in May 1942. The contract price of $367,800 was reduced in the course of the work due to the issuance of a change order, reduction in quantity of stone found to be necessary, and demurrage charges. The tonnage of rock ultimately placed by plaintiff under the contract was 10,000 tons less than that estimated in the Invitation for Bids and amounted to 210,000 tons. Plaintiff has received all of its reduced contract price except

the sum of $100 which has not been paid due to plaintiff's refusal to sign the final voucher.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff sues for $88,000 which, it claims, should be added to the price written in a formal contract which it made with the United States, because the plaintiff, by mistake, omitted an item of $88,000 when it computed its bid for the contract.

On October 23, 1940, the United States Engineer Office, New Orleans, Louisiana, advertised for bids for repairing the rubble-mound East jetty at Calcasieu Pass, Louisiana. Bids were to be opened November 7, at 2 P. M. Alternate (b) of the invitation was the one on which the contract here in question was awarded and it provided, as shown in finding 2, for furnishing all labor and materials except stone, which was to be furnished by the Government, for repairing and extending the jetty.

The plaintiff's home office was in Kansas City, Missouri. It had been in the contracting business for 25 years, and for 15 years its work had been principally on contracts with the Army Engineers, the contracts having amounted to some $60,000,000. When the plaintiff learned of the advertisement for the jetty project, it was about to complete other work where it had equipment suitable for the jetty job. George E. Owens, its general superintendent and chief estimator was away from Kansas City and returned there about November 4. It was decided that a bid would be made on the jetty job, and that Owens should go to New Orleans and there, after inquiry about local wage rates, fuel costs, freight rates, etc., prepare the bid.

Owens arrived in New Orleans on the morning of November 6, the day before the opening of bids. Since he needed no additional information about the value of the use of the plaintiff's own equipment on the job, he first listed on an estimate sheet the items of equipment, the value of the use of each piece per month, and the number of months it would be

used. From these figures he computed and recorded on the sheet the value of the use of the machinery and equipment for the job as $88,000. This sheet is copied in finding 7. Owens spent the rest of November 6 gathering local information, and he then on a second sheet estimated the costs of labor in placing stone, supervision, fuel, insurance, and other miscellaneous matters. On a third sheet he estimated the labor costs of towing and unloading. He finished these sheets after midnight on November 6 and gathered up his scattered papers and put them in a brief case, intending to make up his final estimate and the plaintiff's formal bid on the next morning.

On the morning of November 7, Owens, in taking the papers out of his brief case to complete his work, failed to take out the first sheet prepared by him the day before, on which sheet he had set down the items of value of the use of equipment amounting to $88,000. He therefore, in his final computation, as shown in finding 9, omitted that amount from consideration, and the bid which he submitted was lower by that amount than it would have been but for that omission. He filed the bid shortly before 2 P. M. on November 7, and it and three other bids were opened and read at that hour, as was the Government's own estimate of the cost of the work.

The bids and the Government's estimate are shown in finding 12. As explained in that finding, the Government's estimate included items which would not have been included in a contractor's bid, so its estimate, on a basis comparable to that of the bidders, would have been about $400,000, as against the plaintiff's bid of $367,000. The three bids by other contractors were much higher, being $620,400, $798,600, and $935,000. The District Engineer and his assistant, who were in charge of the opening of bids, had no thought that plaintiff's bid involved a mistake. They talked to Owens about when the work would be started, whether plaintiff's equipment was adequate and other relevant matters. Owens felt that for some reason his bid was too low, but thought he had used poor judgment in his estimates. He said nothing to the Government officials, however, about his feeling that there might have been a mistake.

The way in which the mistake in the bid had been made was not discovered by the plaintiff until November 18. The manner of its discovery is recited in finding 15. Upon its discovery the plaintiff wrote the Engineer Office at New Orleans. See finding 16. It requested that its bid be increased by $88,000, or be rejected without any liability on the bid bond. The District Engineer merely acknowledged this letter, on November 25, and on December 18 wrote the plaintiff accepting its bid as made, denying its request to change its bid and saying:

> You are advised that you have the right to file a claim with the District Engineer for submission through channels to the Comptroller General for further consideration.

The contract and bonds were enclosed for signature by the plaintiff.

The plaintiff considered the advisability of refusing to sign the contract. One of the principal reasons why it did not refuse was that refusal might affect its future relations with the Government agencies with which, as we have seen, most of its business had been done for some years past. Another reason was the fact that it had put up a bond guaranteeing its bid. It was also hopeful that if it filed a claim, as the District Engineer had written that it might, the claim would be allowed.

About December 28, 1940, the plaintiff signed the contract, furnished the requisite bond, and forwarded these to the District Engineer, together with a protest, the text of which is quoted in finding 19, and a letter to the Comptroller General. The contract was approved by the Division Engineer January 8, 1941. The plaintiff's letter to the Comptroller General recited the facts concerning the mistake substantially as we have found them, and asked that it be compensated for the use of its equipment, the value of which use it had not included in its bid.

The plaintiff's officials had conferences with officials of the Corps of Engineers, and submitted affidavits and information to them. The Corps of Engineers forwarded the plaintiff's letter to the Comptroller General on June 13, 1941 with a letter, a part of which is quoted in finding 20, saying

there was doubt whether a mistake had been made, and that the estimate was prepared "in an extremely careless manner." It further said:

> It is thought that it would not be unconscionable to require the contractor to perform the work at its bid price. The present record does not establish that the contractor would incur a loss in performing at the contract price. It is recommended that the claim be disallowed.

The Comptroller General disallowed the claim. The plaintiff performed the contract and was paid the contract price, except $100 which has not been paid because of the plaintiff's refusal to sign the final voucher.

The plaintiff urges here that its contract with the Government should be reformed and enforced as reformed because of either (1) mistake of fact on its part and unconscionable conduct on the part of the Government, or (2) mutual mistake of fact.

At the time the contract was awarded to the plaintiff, pursuant to its bid, and at the time it signed the contract, the plaintiff was not mistaken. It had become aware of the mistake in its bid, and faced the problem of whether it was willing to sign a contract for the figure which it had, by mistake since discovered, bid. The Government was also aware of the plaintiff's claim that it had made a mistake in its bid. There was not, then, at the time of signing the contract, any lack of knowledge, either mutual or unilateral, which caused either of them to make the contract which they did make, when in fact they intended to make a different contract. That being so, if we should reform the contract as the plaintiff requests, we would be making for the parties the very contract which one of them, the Government, expressly refused to make at that time, though requested to do so by the plaintiff.

The plaintiff's contention, to have any merit at all, must relate to the events preceding the signing of the contract. It must relate to the situation after the plaintiff had made its mistaken bid, and had later discovered the mistake and asked, without avail, that its bid be either modified or rejected. If the plaintiff's bid had been an ordinary revocable

offer, it would, upon the discovery of its mistake before acceptance of its offer, have been completely free to revoke its offer and escape a burdensome contract. If, instead of revoking, it had advised the offeree of the mistake and asked him to give it a contract for a higher price than the one offered, and the offeree had refused to do so, the plaintiff might have been in about the same dilemma it was in here. If the offeree was its best customer, the plaintiff might have concluded to stand by the mistaken offer and keep the customer's good will, even though it was free to revoke. If it did let the mistaken offer stand, and made a contract in accordance with it, it could not later claim that that contract should be reformed. It could not be said that it was unconscionable for the offeree to refuse to contract to pay more than he was willing to pay, just because that refusal put the plaintiff in the embarrassing situation of having to choose whether it would go back on its offer, or stand by its word, even to its immediate harm, in order to keep the good opinion of a customer.

The plaintiff's situation here differs from the one discussed above only in the respect that the plaintiff's offer, or bid, was, in terms, irrevocable, and was accompanied by a bond so that the revocation of the bid would have subjected the plaintiff to a liability, unless the mistake which was involved in the bid would have constituted a defense to enforcement of the bond. There was at least a serious possibility of liability on the bond. Was this potential liability, which was one of the factors which the plaintiff considered in deciding to sign the contract, coercive in the sense that it can be said that the contract was signed under duress? It should be said that this factor was not, apparently, the dominant one in arriving at the decision to sign. The dominant factor, it may be inferred from the testimony of the plaintiff's official, was the desire of the plaintiff to keep the good will of its best customer. But to whatever extent the liability on the bid bond was coercive, was it unfairly or unconscionably so?

The Government is required by law to award certain of its contracts on the basis of competitive bids, after advertisement. To make the system work without undue delays and without the opening of the bids being used unfairly to obtain

a disclosure of what competitors are offering, it is necessary that the bids be firm bids, backed by a guaranteed willingness to sign a contract at the bid price. To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons. We seriously doubt whether the plaintiff's estimator, Owens, exercised the care in preparing and presenting the plaintiff's bid which was called for by the important problem with which he was dealing. If not, the plaintiff would not and should not have been released from liability upon its bid bond, since one of the purposes of the bond was to cause bidders to exercise due care. But if the plaintiff, in the circumstances, did not have the right, or if the District Engineer reasonably thought the plaintiff did not have the right to be released without penalty from its bid bond, it was not improperly coercive, or unconscionable, conduct on his part to refuse to voluntarily release the plaintiff. He had the right, and probably the duty, to insist upon what he, reasonably, thought were the Government's rights. That this insistence put the plaintiff in the position where it had to make up its mind whether it would be wiser to refuse to sign the contract and contest by litigation its liability on the bond, or to sign the contract, keep its reputation clear with the Government and seek relief through the discretionary action of higher officials, did not make the insistence unconscionable.

This case differs from the case of *Rappoli* v. *United States*, 98 C. Cls. 499, in the respect that in that case the court found that, concurrently with the signing of the contract, the Government's agents promised the contractor that, upon the fulfillment of certain conditions that were found by the court to have been fulfilled, the mistake would be corrected. Here no such promise was made.

The plaintiff's contract was not made by mistake, nor because of duress or coercion. The petition will be dismissed. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.
LITTLETON, *Judge*, dissents.
JONES, *Judge*, took no part in the decision of this case.

THE CHEROKEE NATION v. THE UNITED STATES

[Nos. L-46 and L-268. Decided January 8, 1945]

On the Proofs

Indian claims; suits under special jurisdictional act.—Claims arising out of treaties or agreements or any act of Congress, relating to the dealings between the Cherokee Nation and the United States from 1791 to date, which have not been heretofore "determined and adjudicated on their merits" by the Court of Claims or the Supreme Court of the United States. (43 Stat. 27, as amended.)

Same; compromise and settlement under the Act of August 6, 1846.—Article VIII of the Treaty of August 6, 1846, with the Cherokee Nation providing for payment to the Cherokee Nation of $20,000.00 "in lieu of all claims of the Cherokee Nation, as a nation, prior to the treaty of 1835," except all lands reserved for school funds, constituted a complete compromise and settlement of any claim for deficiencies, if any, in the delivery of goods pursuant to the annuity provisions of the treaties of 1794 and 1798. (Claim No. 1.)

Same; claim for shortage in number of acres sold under Treaty of February 27, 1819.—With respect to plaintiff's claim that there was a shortage in the number of acres sold by the United States and the proceeds invested in a school fund for the Cherokees, in accordance with the treaty of February 27, 1819, by which the Cherokee Nation ceded to the United States a tract "12 miles square" for that purpose; it is *held* that the tract, as described in the cession, was not a perfect square and it is not possible to determine from the evidence exactly how many acres of salable land the tract did contain. (Claim No. 2.)

Same; diversion of funds belonging to hostile tribes for relief of loyal Indians.—Where it is apparent, from the legislative history of the acts of Congress passed during the war period that it was the intent of Congress to divert the school land funds of the hostile Indian tribes to the relief of loyal Indians, who were destitute; it is *held* that Congress had the power so to deal with the property of hostile tribes. (Claim No. 2.)

Same; no liability of defendant to restore funds diverted.—The expenditure of a part of the Cherokees' funds for the relief of destitute loyal Indians of other tribes, while the Cherokees were in a state of hostility to the United States, did not, under the relevant acts of Congress and the Treaty of July 19, 1866, create any liability on the part of the United States to restore the amounts so expended to the Cherokees' funds. (Claim No. 2.)

Same; item not included in petition but disclosed by accounting, nature of which is not ascertained.—Where in its petitions the plaintiff asserted that before the petitions were written its accountants had worked for several years on the accounts involved, which were accordingly presented to the court in definite form and generally for specific amounts; and where the Government in preparing its defense called upon the General Accounting Office to furnish an accounting in response to the claims made in the plaintiff's petitions, which was done, requiring several additional years' work; the court will not remand the case for a further accounting to determine the nature of an item of $504.33, not included in petition, which on June 30, 1891 was withdrawn from the Cherokee school funds and returned to the United States Treasury, seeming to indicate a liability on the part of the Government but which might well be explained if studied by accountants aware that a claim was being based upon it. (Claim No. 3.)

Same; right of trustee to reimbursement for expenses incurred.—In the absence of any showing to the contrary, it is held that the United States had the usual right of a trustee to reimburse itself out of the funds held in trust for plaintiff for its necessary out-of-pocket expenses in the administration of the trust. (Claim No. 4.)

Same; interest on proceeds of sale of tribal funds.—The appropriation by Congress of $50,000.00 for the purchase from the Cherokees of lands which were later sold to the Ponca Indians, in accordance with the agreements made by the parties, for a sum of $48,389.46, which was deposited to the credit of the Cherokees, did not entitle the Cherokees to interest until the price was agreed on and the purchase was in fact made. (Claim No. 5.)

Same; date when interest on tribal funds begins under Act of March 3, 1873.—Where the United States, by agreement with the Cherokees, sold some of the Cherokees' lands to the Osage Tribe and agreed to put the proceeds into an interest-bearing trust fund for the Cherokees, the plaintiff was not entitled to interest from the date of the appropriation for this purpose but from the date of certification, under the provision of the Act of March 3, 1873, that interest should begin "whenever the amount to be so transferred shall be certified to the said Secretary of the Treasury by the Secretary of the Interior." (Claim No. 6.)

Same; the United States not liable for interest unless specified or as part of just compensation.—The Government is not liable for interest unless it has promised to pay it, or unless interest is granted as a measure of just compensation for a past taking of property. (Claims Nos. 7 and 8.)

Same; interest on first installment of amount paid for Cherokee Outlet under Act of March, 1893.—Where Congress in the Act

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of March 3, 1893, provided for interest on each deferred installment of the amount agreed to be paid for the tract of land known as the "Cherokee Outlet," until each installment was due, the Act setting March 4, 1895, as the due date of the first installment; and where the amount for the first installment was duly appropriated by Congress and was deposited in the United States Treasury on March 4, 1895, to the credit of the Cherokee Nation for payment to the Delawares, Shawnees and Cherokee Freedmen, who had been determined by that time to be entitled to approximately one-fifth of the purchase price; and where interest on the first installment was computed by the United States at 4 per cent from March 3, 1893, to March 4, 1895, and paid to the Cherokee Nation, but no interest was computed by the United States or paid to the Cherokee Nation on the amount of the installment after March 4, 1895; it is *held* that there was no promise to pay interest upon the first installment after it was due and had been made available to those entitled to receive it and plaintiff is not entitled to recover. (Claim No. 8.)

Same; expenses of distribution improperly charged to fund.—Where certain expenses were incurred in connection with the distribution to the Shawnees and the Cherokee Freedmen of their proportionate part of the price paid by the United States for the purchase of the Cherokee Outlet which were charged to the fund; and where the Cherokee Nation was entitled to the balance of the fund, if any, after such distribution; it is *held* that the charging of these expenses to the fund amounted to charging them to the Cherokee Nation and plaintiff is entitled to recover. (Claim No. 9.)

Same; claims not pleaded in plaintiff's petitions.—Where a claim was not pleaded with particularity in the petitions but all the relevant facts are properly in evidence, the court will decide the claim on the merits; but where such claims, not pleaded, are not shown to have been illegal disbursements recovery is not allowable. (Claims Nos. 6, 8, 12, 13, 14.)

Same; items not involved in "Slade and Bender report" and items which may have been considered and rejected by these accountants.—The items not involved in the "Slade and Bender accounting" (House Ex. Doc. No. 182, 53rd Congress, 3rd session) and items which Slade and Bender may have considered and rejected on their merits, as the accountants viewed them, were not sued for in the case of *Cherokee Nation* v. *United States*, (No. 23199), 40 C. Cls. 252; affirmed 202 U. S. 101; they were not adjudicated "on their merits" within the meaning which Congress must have intended to give this phrase in the jurisdictional act (43 Stat. 27) under which the instant suits (Nos. L-46 and L-268) were brought, and the court has, therefore, not regarded them as excluded from consideration by the litigation which followed the Slade and Bender report.

Same; offsets under the Act of August 25, 1935.—It having been found that the plaintiff in the instant suits is entitled to recover the sum of $25,240.72 from the United States, as set forth in the findings of fact and opinion, this liability is cancelled by an offset of like amount out of the $142,066.22 found to have been expended gratuitously for the plaintiff by the United States, as shown by the report of the General Accounting Office, filed September 27, 1937, under the Act of August 25, 1935 (49 Stat. 571); and the plaintiff's petitions are dismissed.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff. *Messrs. Frank K. Nebeker* and *Frank J. Boudinot* were on the briefs.

Mr. Charles H. Small, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The court made special findings of fact as follows:

1. These cases are instituted and prosecuted under the following Act of Congress:

> An Act Conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Cherokee Indians may have against the United States, and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Cherokee Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Cherokee Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.
>
> SEC. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act, and such suit shall make the Cherokee Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such

claim or claims under contract with the Cherokees approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

SEC. 3 In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this Act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

SEC. 5. That upon the final determination of any suit instituted under this Act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the attorney or attorneys so employed by said Indian nation for the services and expenses of said attorneys rendered or incurred prior or subsequent to the date of approval of this Act: *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case.

Approved, March 19, 1924 (43 Stat. 27).

By a joint resolution of Congress approved February 19, 1929, the time within which suit might be brought pursuant to the foregoing Act was extended to June 30, 1930.

2. During the years 1791 to 1816, inclusive, the United States made treaties with the plaintiff in which certain annuities were guaranteed to the plaintiff in consideration of various cessions of land and other relinquishments. References to these treaties are as follows:

Date	Statutes at Large		Article
	Vol.	Pg.	
July 2, 1791	7	39	4
February 17, 1792	7	42	----
June 26, 1794	7	43	3
October 2, 1798	7	62	6
October 24, 1804	7	228	2
October 25, 1805	7	93	3
January 7, 1806	7	101	2
September 14, 1816	7	148	3

On December 29, 1835, 7 Stat. 478, the United States made another treaty with the plaintiff and, in Article XI thereof, agreed to commute the annuities, then amounting to $10,000 annually, for the sum of $214,000. This treaty was proclaimed by the President May 23, 1836, and subsequently an Act of Congress dated July 2, 1836, 5 Stat. 73, made various appropriations to fulfill the provisions of this treaty. The annuities were thereby terminated in 1836.

On August 6, 1846, a treaty (9 Stat. 871) was concluded between the United States and the plaintiff, Article VIII of which provided:

> The United States agree to pay to the Cherokee nation * * * the further sum of twenty thousand dollars, in lieu of all claims of the Cherokee nation, as a nation, prior to the treaty of 1835, except all lands reserved, by treaties heretofore made, for school funds.

Pursuant to this treaty provision, the sum of $20,000 was appropriated by the Act of March 1, 1847, 9 Stat. 132, 145, and duly paid to the Cherokee nation.

3. The Treaty of June 26, 1794, 7 Stat. 43, Article III, contained the following provision for an annual allowance of goods to the amount of $5,000:

> The United States, to evince their justice by amply compensating the said Cherooke (sic) nation of Indians

> for all relinquishments of land made either by the treaty of Hopewell upon the Keowee river, concluded on the twenty-eighth of November, one thousand seven hundred and eighty-five, or the aforesaid treaty made upon Holston river, on the second of July, one thousand seven hundred and ninety-one, do hereby stipulate, in lieu of all former sums to be paid annually to furnish the Cherokee Indians with goods suitable for their use, to the amount of five thousand dollars yearly.

The Treaty of October 2, 1798, 7 Stat. 62, Article VI, read as follows:

> In consideration of the relinquishment and cession hereby made, the United States upon signing the present treaty, shall cause to be delivered to the Cherokees, goods, wares and merchandise, to the amount of five thousand dollars, and shall cause to be delivered, annually, other goods, to the amount of one thousand dollars, in addition to the annuity already provided for; and will continue the guarantee of the remainder of their country forever, as made and contained in former treaties.

The following table shows the obligations arising under the paragraphs of the two treaties set out above for the period 1794 to 1805, inclusive, and the satisfaction of those obligations to the extent to which satisfactory evidence thereof has been introduced:

Item No.	Due date	Obligation	Payment [1]	
1	June 26, 1794	$5,000.00	$5,158.55	Nov. 9, 1794.
2	June 26, 1795	5,000.00		
3	June 26, 1796	5,000.00		
4	June 26, 1797	5,000.00	1,700.00	1797.
5	June 26, 1798	5,000.00	5,272.08	Mar. 7, 1798.
6	Oct. 2, 1798	5,000.00	5,001.60	May 13, 1798.
7	June 26, 1799	5,000.00		
8	Oct. 2, 1799	1,000.00	5,998.85	May 2, 1799.
9	June 26, 1800	5,000.00		
10	Oct. 2, 1800	1,000.00	6,000.11	July 28, 1800.
11	June 26, 1801	5,000.00		
12	Oct. 2, 1801	1,000.00	6,000.00	1801.
13	June 26, 1802	5,000.00		
14	Oct. 2, 1802	1,000.00	6,000.00	1802.
15	June 26, 1803	5,000.00		
16	Oct. 2, 1803	1,000.00	5,999.81	1803.
17	June 26, 1804	5,000.00		
18	Oct. 2, 1804	1,000.00	6,015.30	1804.
19	June 26, 1805	5,000.00		
20	Oct. 2, 1805	1,000.00	6,000.41	July 25, 1805.
		72,000.00	59,146.71	

Excess of obligations over amounts satisfactorily shown to have been paid $12,853.29

[1] The word "payment" is used in this finding to describe the satisfaction of the obligations whether by cash or otherwise.

For the period 1806 to 1836, inclusive, the Congress appropriated amounts sufficient to meet similar annual obligations which arose under the above treaties and other treaties which were in effect during that period. The defendant duly satisfied those obligations.

4. The School Fund of the Cherokee Indian Nation or Tribe originated under provisions of the Treaty of February 27, 1819, 7 Stat. 195, and was established by the investment of the proceeds of the sale of Cherokee lands in the States of Tennessee and Alabama. In that treaty between the United States and the Cherokee Nation, a cession of land was made by the Cherokees to the United States, and certain reservations of land or of interests in land were made by the Cherokees, one of which is described in Article 1 as follows:

> * * * and it is also understood, that * * * a tract equal to twelve miles square, to be located by commencing at the point formed by the intersection of the boundary line of Madison county, * * * and the north bank of the Tennessee River; thence, along the said line, and up the said river twelve miles, are ceded to the United States, in trust for the Cherokee nation as a school fund; to be sold by the United States, and the proceeds vested (sic) as is hereafter provided in the fourth article of this treaty.

Article 4 provides in part as follows:

> The United States stipulate that * * * the tract reserved for a school fund, in the first article of this treaty, shall be surveyed and sold in the same manner, and on the same terms, with the public lands of the United States, and the proceeds vested (sic), under the direction of the President of the United States, in the stock of the United States, or such other stock as he may deem most advantageous to the Cherokee nation. The interest or dividend on said stock, shall be applied, under his direction, in the manner which he shall judge best calculated to diffuse the benefits of education among the Cherokee nation on this side of the Mississippi.

5. The school tract referred to by the above treaty and hereinafter sometimes referred to as the Alabama School Lands was surveyed by the Government during the period 1820 to 1830, and in October 1830 the United States began the sale of these lands. The sales continued from time to time until April 1923 and 89,111.94 acres were sold during

the period 1830 to 1923. Most of the sales were made at a price of $1.25 per acre and no sales were made for less than that price. A few sales were made at a higher price, the average for the entire acreage sold being approximately $1.34 per acre. The total gross sales price for the land sold was $119,336.25.

The ceded tract "12 miles square" etc., was bounded on its southwesterly side by the Tennessee River, and two tributaries of that river, the *Flint*, and the *Paint Rock*, flowed through the tract. The tract did not, therefore, contain the exact number of acres of salable land which a perfect square would have contained. The evidence does not satisfactorily establish the number of acres of salable land which the tract contained.

The evidence does not show whether reservations of three parcels of land, containing 1,742.94 acres, mentioned in the evidence, were placed on the treaty tract before or after that tract was ceded to the United States under the Treaty of February 27, 1819.

6. In connection with the sales referred to in finding 5, the United States deducted from the gross proceeds of $119,-336.25, certain incidental expenses connected with the sales in the amount of $3,222.59. The net proceeds from the sales after these deductions were $116,113.66. In addition to the receipts from these sales, Congress, by the Act of June 25, 1864, 13 Stat. 180, appropriated the sum of $16,758.04 as interest on uninvested proceeds of sales of these lands made during the period April 1, 1850, to December 31, 1860, and pursuant to the authority contained in the Act of April 1, 1880, 21 Stat. 70, there was set up on the books of the United States Treasury the sum of $816.60 as interest on uninvested proceeds of the sales of lands made during the period January 1, 1883, to September 30, 1890.

7. The following statement shows the funds referred to in the preceding finding and the manner in which they were accounted for on the books of the United States Treasury:

		Dr.	*Cr.*
Net receipts from sale of Alabama School Lands	(a)	$116, 113. 66	
Interest appropriated by Congress	(b)	16, 758. 04	

		Dr.		Cr.
Interest appropriated by Congress	(c)	$816.60		
Amount credited to the Cherokee Nation of Indians under:				
"Cherokee Schools under Treaty of February 27, 1819"			(d)	$51,995.12
"Fulfilling Treaties with Cherokees, Proceeds of Cherokee School Lands, Treaty of 1819"			(e)	37,767.99
"Fulfilling Treaties with Cherokees, Proceeds of Cherokee School Lands, Treaty of 1819"			(f)	16,758.04
"Fulfilling Treaties with Cherokees, Proceeds of School Lands"			(g)	2,786.04
"Cherokee School Fund"			(h)	23,564.51
"Interest on Cherokee School Fund"			(i)	816.60
		$133,688.30		$133,688.30

Items (d), (e), (f), (g), (h) and (i) were in part invested in securities pursuant to the Treaty of 1819. Substantially all of the amounts not so invested have been satisfactorily shown to have been expended for the benefit of the Cherokee Nation, in most instances for purposes of education. However, during the period 1863 to 1867 expenditures were made from these funds for the relief of refugee Indians, including $157.25 for the Wichitas, $511.80 for the Seminoles, and $2,161.12 for "tribes not designated." During the same period funds of the United States and funds of other tribes were used for the benefit of Cherokee refugees.

On October 7, 1861, the Cherokee Nation entered into "a treaty [1] of friendship and alliance" "offensive and defensive" with the Confederate States, under which the Confederate States were put in the position which the United States had occupied, as trustee for the Indians. Many of the Cherokees took up arms against the United States, and individual Cherokees who remained loyal to the United States were

[1] Confederate Statutes at Large, Indian Treaties and Laws, 394 ff.

driven from their homes and became destitute. Accordingly, it was provided by the Act of July 5, 1862, 12 Stat. 512, 528, and similarly by the Acts of March 3, 1863, 12 Stat. 774, 793; June 25, 1864, 13 Stat. 180; and March 3, 1865, 13 Stat. 541, 562, that appropriations to carry into effect treaty stipulations with said tribes be postponed in such amounts and for such time as directed by the President and that certain of such sums might be used for the relief and support of such refugee individuals. In the administration of these acts funds of one tribe were often used for the relief of other tribes, as shown above.

8. On June 30, 1891, the Secretary of the Interior withdrew $504.33 from the Cherokee funds and returned it to the United States Treasury. The evidence does not show the reason for this action, nor the circumstances under which it was taken.

9. The so-called "Neutral Lands" in Kansas consisted of a tract of land about 25 miles wide and 50 miles long, containing approximately 800,000 acres, which lands were located in the southeastern corner of the State of Kansas. This tract of land was sold, along with other lands, to the Cherokee Nation under Article 2 of the Treaty of December 29, 1835, 7 Stat. 478, 479, for a consideration of $500,000. The part of that article, as amended, which conveyed these lands to the Cherokee Nation, reads as follows:

> And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby covenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the

> same shall be reserved and excepted out of the lands above granted and a pro-rata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

Congress appropriated to the Cherokees $5,000,000 under the Act of July 2, 1836, 5 Stat. 73, and deducted $500,000 from that sum to pay for the lands above referred to.

Under the Treaty of July 19, 1866, 14 Stat. 799, the Cherokee Nation ceded the Neutral Lands in Kansas and also the Strip Lands (see finding 10) to be sold as the public lands of the United States and the proceeds invested in United States bonds as trust funds. Articles XVII, XIX and XXIII of this treaty are as follows:

> ARTICLE XVII. The Cherokee nation hereby cedes, in trust to the United States, the tract of land in the State of Kansas which was sold to the Cherokees by the United States, under the provisions of the second article of the treaty of 1835; and also that strip of the land ceded to the nation by the fourth article of said treaty which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State.
>
> The lands herein ceded shall be surveyed as the public lands of the United States are surveyed, under the direction of the commissioner of the general land office, and shall be appraised by two disinterested persons, one to be designated by the Cherokee national council and one by the Secretary of the Interior, and, in case of disagreement, by a third person, to be mutually selected by the aforesaid appraisers. The appraisement to be not less than an average of one dollar and a quarter per acre, exclusive of improvements.
>
> And the Secretary of the Interior shall from time to time, as such surveys and appraisements are approved by him, after due advertisements for sealed bids, sell such lands to the highest bidders for cash in parcels not exceeding one hundred and sixty acres, and at not less than the appraised value: *Provided*, That whenever there are improvements of the value of fifty dollars made on the lands not being mineral, and owned and personally occupied by any person for agricultural purposes at the date of the signing hereof, such person so owning, and in person residing on such improvements, shall, after due proof, made under such regulations as the Secretary of the Interior may prescribe, be entitled to buy, at the

appraised value, the smallest quantity of land in legal subdivisions which will include his improvements, not exceeding in the aggregate one hundred and sixty acres; the expenses of survey and appraisement to be paid by the Secretary out of the proceeds of sale of said land: *Provided*, That nothing in this article shall prevent the Secretary of the Interior from selling the whole of said lands not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre.

ARTICLE XIX. All Cherokees being heads of families residing at the date of the ratification of this treaty on any of the lands herein ceded, or authorized to be sold, and desiring to remove to the reserved country, shall be paid by the purchasers of said lands the value of such improvements, to be ascertained and appraised by the commissioners who appraise the lands, subject to the approval of the Secretary of the Interior; and if he shall elect to remain on the land now occupied by him, shall be entitled to receive a patent from the United States in fee simple for three hundred and twenty acres of land to include his improvements, and thereupon he and his family shall cease to be members of the nation.

ARTICLE XXIII. All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee nation, and shall be applied to the following purposes, to-wit: thirty-five percent shall be applied for the support of the common schools of the nation and educational purposes; fifteen per cent for the orphan fund, and fifty per cent for general purposes, including reasonable salaries of district officers; and the Secretary of the Interior, with the approval of the President of the United States, may pay out of the funds due the nation, on the order of the national council or a delegation duly authorized by it, such amount as he may deem necessary to meet outstanding obligations of the Cherokee nation, caused by the suspension of the payment of their annuities, not to exceed the sum of one hundred and fifty thousand dollars.

10. The so-called "Strip Lands" in Kansas consisted of a strip of land 2 or 3 miles wide and about 275 miles long,

containing 434,684.33 acres, which ran along the southern boundary of the State of Kansas, from the Neosho River in the east to 100 degrees west longitude, of which strip 75,-511.90 acres were of the original Cherokee Home Tract and 359,172.43 acres of the original Cherokee Outlet. See 20 C. Cls. at 466, 469. Under the Treaty of July 19, 1866, 14 Stat. 799, Articles XVII and XIX, the Cherokee Nation ceded the Strip Lands to be sold as the public lands of the United States, the proceeds to be invested in United States bonds as trust funds. See finding 9.

Statutory provisions for the sale of the Strip Lands and disbursement of the proceeds, are found in the following acts of Congress:

An Act to carry out certain Provisions of the Cherokee Treaty of eighteen hundred and sixty-six, and for the Relief of Settlers on the Cherokee Lands in the State of Kansas.

Whereas in order that certain provisions of the treaty of July nineteenth, eighteen hundred and sixty-six, between the United States and the Cherokee nation may be rendered clearer, and made more satisfactory to settlers upon the lands known as the "Cherokee strip," in the State of Kansas, said settlers having moved thereon since the date of said treaty, and for the purpose of facilitating the sale of said lands: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the strip of land lying west of the Neosho river, and included in the State of Kansas, conveyed to the Cherokee nation of Indians by the United States, and now belonging to said nation, shall be surveyed, under the direction of the commissioner of the general land office, in the same manner as the public lands of the United States are surveyed, and shall be by him offered for sale under the provisions and restrictions of this act; and all the lands in said tract lying east of the Arkansas river shall be sold at two dollars per acre, and all lands in said tract lying west of said river shall be sold at one dollar and fifty cents per acre, except as hereinafter provided: *Provided*, That where there is a fraction of land less than forty acres, the same shall be sold with the contiguous tract, expense of survey to be paid out of the proceeds of said land in accordance with the treaty of July ninth, eighteen hundred and sixty-six.

SEC. 2. That each person being the head of a family or over twenty-one years of age who has made a bona-fide settlement and improvement upon any portion of said lands, and is now occupying the same, or, in case of his or her death, the heirs of such, or, if such heirs are minors, their guardians for them, shall be entitled to enter and purchase the lands so settled upon and occupied, not exceeding one hundred and sixty acres, at the price fixed in the first section of this act, payment for which shall be made at any time within one year from the date of the approval by the Secretary of the Interior of the acceptance of the provisions of this act, as provided for in the fifth section hereof; and all persons heads of families or over twenty-one years of age who may settle upon said lands at any time within one year from the date of the passage of this act, may purchase the land so settled upon, not exceeding one hundred and sixty acres, at the price fixed in the first section of this act and shall make payment therefor within one year from the date of said settlement: *Provided*, That all lands not sold under the foregoing provisions of this section, and all lands settled upon but unpaid for at the expiration of the limitation named in the foregoing provisions of this act, shall, unless such payment be suspended by reason of contest or appeal, be sold by the Secretary of the Interior, on sealed bids, after due advertisement, in tracts not exceeding one hundred and sixty acres, and at not less than the price fixed in the first section of this act: *Provided further*, That proof of settlement, entry, and payment shall be made at the land-office of the proper district, under such regulations as the commissioner of the general land office shall prescribe: *And provided further*, That the townsite laws shall be, and hereby are, extended to and made applicable to said lands, subject to the provisions of this act: *And provided further*, That the Secretary of the Interior may cause public advertisement to be made of the provisions of this act.

SEC. 3. That any Cherokee citizen, or the heirs at law of such who had rights under the Cherokee laws to any portion of said lands, and whose titles were valid at the date of the treaty of eighteen hundred and sixty-six, and who may be able to establish such validity within one year from the date of the passage of this act, under such rules as the Secretary of the Interior may prescribe, shall receive the proceeds of the sale of such identical lands, not exceeding one hundred and sixty acres, instead of their being invested as hereinafter provided for in the fourth section of this act.

SEC. 4. That all moneys accruing from the sales of land under this act shall, without unnecessary delay, be invested in the registered five per centum bonds of the United States, provided in the twenty-third article of the treaty of eighteen hundred and sixty-six.

SEC. 5. That the sale of said lands, as hereinbefore provided for, shall not take place until the provisions of this act are accepted by the Cherokee national council, or by a delegation duly authorized thereby; which acceptance shall be filed with the Secretary of the Interior, and, when approved by him, the same shall be final and conclusive. (17 Stat. 98, approved May 11, 1872)

An act to provide for the sale of certain lands in Kansas.

Whereas, certain lands in the State of Kansas, known as the Cherokee strip being a strip of land on the southern boundary of Kansas, some two or three miles wide, detached from the lands patented to the Cherokee Nation by the act known as the Kansas-Nebraska bill, in defining the boundaries thereof, said lands still being, so far as unsold, the property of the Cherokee Nation; and

Whereas an act was passed by the Forty-second Congress, which became a law on its acceptance by the Cherokee national authorities, and which fixed the price of the lands east of the Arkansas River at two dollars per acre, and west of said river at one dollar and fifty cents per acre; and

Whereas portions of the same have been sold under said law, and portions remain unsold, the price being too high: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary shall offer for sale to settlers all of said tract remaining unsold at the passage of this act at the local land offices in the districts in which it is situated, at one dollar and twenty-five cents per acre; and all of said lands remaining unsold after one year from the date at which they are so offered for sale at the local land-offices shall be sold by the Secretary of the Interior for cash, in quantities or tracts not exceeding one hundred and sixty acres, at not less than one dollar per acre.

SEC. 2. That the proceeds of said lands shall be paid into the Treasury of the United States, and placed to the credit of the Cherokee Nation, and shall be paid to

the treasurer of the Cherokee Nation, on the order of the legislative council of the Cherokee Nation.

SEC. 3. That this act shall take effect and be in force from the date of its acceptance by the legislature of the Cherokee Nation, who shall file certificate of such acceptance. (19 Stat. 265, approved February 28, 1877.)

That the remaining proceeds or balances of the sales of the Cherokee Strip in Kansas, disposed of under the seventeenth section of the treaty of said nation with the United States of July, eighteen hundred and sixty-six, and under acts of Congress approved May eleventh, eighteen hundred and seventy-two, and February twenty-eighth, eighteen hundred and seventy-seven, and held for alleged charges for land office expenses not authorized by treaty, amounting to nineteen thousand eight hundred and forty-three dollars and eighty-two cents, or thereabouts, shall be placed to the credit of the Secretary of the Interior as custodian of said trust funds, and shall be forwarded to the treasurer of the Cherokee Nation as other funds of said tribe, to be immediately available. (26 Stat. 989, 1011, approved March 3, 1891.)

11. Pursuant to the governing treaties and acts of Congress, the Secretary of the Interior sold the Strip Lands in Kansas for a total amount of $559,809.63. Before crediting that amount to the Cherokee Nation, as provided above, there was deducted therefrom an amount of $9,131.77 which represented expenses of sale as follows:

Advertising	$7,648.75
Expense of depositing	1,134.20
Fees and commissions	336.82
Office expense	12.00
Total	9,131.77

12. As a part of the consideration for an agreement of December 19, 1891, between the plaintiff nation and the United States, ratified by the Act of March 3, 1893, 27 Stat. 612, 640, the United States promised to render to the Cherokee Nation a complete account of monies due the Cherokee Nation under any of the treaties ratified in the years 1817, 1819, 1825, 1828, 1833, 1835, 1836, 1846, 1866, and 1868 and any Congressional acts passed for the purpose of carrying any of such treaties into effect. The agreement provided

that the Cherokee Nation, upon the rendering of such account, might sue the United States in the Court of Claims within twelve months for any alleged or declared amount of money promised and withheld by the United States under such treaties or laws which the Cherokee Nation might claim were omitted improperly, unjustly, or illegally in said account. It was further promised that Congress would appropriate any sum of money so found to be withheld at its current session, if then in session, or at the session immediately following, if not in session when the account was rendered.

Such an account, as of April 28, 1894, known as the "Slade & Bender Account," was rendered to the Cherokee Nation by the United States. House Ex. Doc. No. 182, 53rd Congress, 3rd Session. The statement of account covered every point of disagreement which had been raised under the treaties described in the agreement. A number of demands made by the Cherokee Nation were disallowed and other items were declared to be due from the United States to the Cherokee Nation.

The account so rendered was accepted by the Cherokee Nation by an act of its national council, approved December 1, 1894, and no suit was brought by the Cherokee Nation as authorized by the agreement. Notice of such acceptance was transmitted to Congress on January 7, 1895, but no sum was appropriated or paid in settlement of the sums found to be due in said account. No further steps were taken until the passage of the Acts of July 1, 1902, 32 Stat. 706, and March 3, 1903, 32 Stat. 996, conferring jurisdiction on the Court of Claims to hear and determine the claims of the Cherokee Nation.

Pursuant to the authority of these Acts of Congress, "the Cherokee Nation," "the Eastern Cherokees," and "the Eastern or Emigrant Cherokees" commenced actions in the Court of Claims against the United States, which actions were consolidated for trial. Judgment was rendered against the United States in favor of the Cherokees for the sums stated to be owing in the Slade and Bender account. There was no determination by the court of the correctness of the items in the account, the court holding that, by reason of the facts recited above, the account had become conclusive against the

United States. The foregoing facts are set forth in more detail in the findings of fact reported in *The Cherokee Nation* v. *United States*, 40 C. Cls. 252, 253–299, which are incorporated herein by reference. The decisions were affirmed by the Supreme Court in *United States* v. *Cherokee Nation*, 202 U. S. 101.

13. Among the items considered in the Slade and Bender Report was an accounting for the proceeds from the sale of the Strip Lands in Kansas referred to in finding 11, and in that accounting a balance was shown due the Cherokee Nation of $432.28. In *Cherokee Nation* v. *United States*, *supra*, this court entered judgment for that amount with interest at 5 percent from January 1, 1874, to date of payment. That amount, $432.28, with interest of $708.21, has been paid to the Cherokee Nation.

In arriving at the balance of $432.28 due the Cherokee Nation, the accountants, Slade and Bender, deducted from the gross proceeds "Expenses of survey and sale . . . $22,479.71". This amount must have consisted of the two items shown by plaintiff in its accounting as follows:

Expenses of sale	$9, 131. 74
Expenses of survey	13, 347. 97

since the sum of these two items is $22,479.71, the exact amount deducted by Slade and Bender in their account. This computation is also confirmed by the General Accounting Office's accounting in this suit, which is given in finding 11, and which varies by only three cents from the plaintiff's accounting as to the expenses of sale.

14. Article XVI of the Treaty of July 19, 1866, 14 Stat. 799, between the United States and the Cherokee Nation, provided as follows:

> ARTICLE XVI. The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes to be held in common or by their members in severalty as the United States may decide.
>
> Said lands thus disposed of to be paid for to the

> Cherokee nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.
>
> The Cherokee nation to retain the right of possession of and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

Under this authority the United States sold 100,894.31 acres of land in the Cherokee Outlet to the Ponca Indians for a consideration of $48,389.46, which sum was paid from an appropriation of $50,000 made by the Act of March 3, 1881, 21 Stat. 414, 422, as follows:

> For the purchase of one hundred and one thousand eight hundred and ninety-four acres of land in the Indian Territory, where most of these Indians [Poncas] are now located, fifty thousand dollars.

This sale of land was subsequently ratified by an agreement between the Cherokee Nation and the Poncas dated June 14, 1883.

The Act of April 1, 1880, 21 Stat. 70, provided as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and he is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usuall manner, as each may become due, without further appropriation by Congress.
>
> Approved, April 1, 1880.

The amount of $48,389.46 which was paid from an appropriation of $50,000 made by the Act of March 3, 1881, *supra*, on account of the sale of the lands to the Poncas was deposited in the United States Treasury to the credit of the Cherokee Nation on November 17, 1881, as follows:

National Fund	$24,194.73
School Fund	16,936.32
Orphan Fund	7,258.41
Total	48,389.46

Interest was computed and paid at 5 percent per annum on that deposit of $48,389.46 from November 17, 1881, the date of its deposit in the United States Treasury. Plaintiff contends that in addition interest at 5 percent per annum should have been computed on that amount from March 3, 1881, the date of the appropriation act out of which the payment was made, to the date it was deposited in a trust account for the Cherokees in the United States Treasury, November 17, 1881. Interest computed at that rate for that period amounts to $1,707.07. The evidence does not show when an agreement was arrived at between the Poncas and the Cherokee Nation as to the price of the land other than that this sale of land was ratified by an agreement between the Cherokee Nation and the Poncas dated June 14, 1883. The record likewise does not show whether or at what time the President fixed the price for the land.

15. By Act approved July 15, 1870, 16 Stat. 362, Sec. 12, Congress provided for the removal of the Osages to the Indian Territory, such section of that Act reading in part as follows:

> *And be it further enacted*, That whenever the Great and Little Osage Indians shall agree thereto, in such manner as the President shall prescribe, it shall be the duty of the President to remove said Indians from the State of Kansas to lands provided or to be provided for them for a permanent home in the Indian Territory, to consist of a tract of land in compact form equal in quantity to one hundred and sixty acres for each member of said tribe, or such part thereof as said Indians may desire, to be paid for out of the proceeds of the sales of their lands in the State of Kansas, the price per acre

for such lands to be procured in the Indian Territory not to exceed the price paid or to be paid by the United States for the same. * * *

That Act was amended by the Act of June 5, 1872, 17 Stat. 228, 229, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in order to provide said Osage tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation, the following-described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas river, and on the north by the south line of the State of Kansas: *Provided*, That the location as aforesaid shall be made under the provisions of article sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto: *And provided further*, That said Great and Little Osage tribe of Indians shall permit the settlement within the limits of said tract of land [of] the Kansas tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding one hundred and sixty acres for each member of said tribe, to be paid for by said Kansas tribe of Indians out of the proceeds of the sales of their lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee nation of Indians.

Under date of February 14, 1873, 17 Stat. 462, Congress appropriated $175,000 from the proceeds of lands sold by the Cherokees to the Osages to be expended for the benefit of the Cherokee Nation as provided by section 4 of that Act which reads as follows:

> That there shall be set apart from the funds belonging to the Cherokee nation, on the proper order of the national council, the sum of one hundred thousand dollars from the proceeds of lands sold to the Osages, to be set apart, and eighty thousand dollars thereof to be invested as part of the orphan-fund, and twenty thousand dollars to be expended for buildings and other improvements deemed necessary for the benefit of the

institution for the orphans; the sum of one hundred thousand dollars from the proceeds of the strip of land in Kansas to be set apart for an asylum for the insane, deaf and dumb, blind, and indigent persons of the Cherokee nation, seventy-five thousand dollars of said amount to be invested as a separate fund, and its interest semi-annually applied to the support of said institution, the remaining twenty-five thousand dollars to be expended for its establishment; the sum of seventy-five thousand dollars from the proceeds of the sale of lands to the Great and Little Osages, to be expended for the establishment of a literary institution for the education of indigent persons of said nation, under such rules and regulations as the national council of the Cherokees may prescribe.

By Act of March 3, 1873, 17 Stat. 538, Congress appropriated the sum of $1,650,600 from the proceeds of the sale of Osage lands in Kansas, or so much thereof as might be necessary, in payment for the lands sold to the Osages by the Cherokee Nation, that Act reading in part as follows:

> *Indian Bureau*—That the Secretary of the Treasury is hereby authorized and directed to transfer from the proceeds of sale of the Osage Indian lands in Kansas, made in accordance with the twelfth section of the act of Congress approved July fifteenth, eighteen hundred and seventy, the sum of one million six hundred and fifty thousand six hundred dollars, or so much thereof as may be necessary, to pay for lands purchased by the Osages from the Cherokees, and to place the same on the books of his Department to the credit of the Cherokee Indians, the same shall bear interest at the rate of five per cent., in accordance with the act of Congress approved June fifth, eighteen hundred and seventy-two, entitled "An act to confirm to the Great and Little Osage Indians a reservation in the Indian Territory," and the acts of Congress and treaties therein mentioned and referred to, whenever the amount to be so transferred shall be certified to the said Secretary of the Treasury by the Secretary of the Interior. *Provided*, That nothing herein contained shall be construed as in any manner changing the provisions of section four of the act "making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes."

March 3, 1875, 18 Stat. 451, Congress appropriated $200,000 of the proceeds of lands sold to the Osages by the Cherokee Nation for the purchase of provisions for the Cherokee Nation, section 13 of that Act reading as follows:

> SEC. 13. That the Secretary of the Interior be, and he is hereby, authorized and required to pay to the treasurer of the Cherokee Nation of Indians, at his earliest convenience, the sum of two hundred thousand dollars, from the trust-funds held by the United States belonging to said nation of Indians, arising from the sales of the Cherokee lands lying south of Kansas and west of the ninety-sixth meridian of west longitude (disposed of to the Osage Indians); said amount to be used by said nation in purchasing breadstuffs for said Cherokee Indians, rendered necessary to keep them from suffering in consequence of the destruction of their crops during the past season by the drought, grasshoppers, and chinch bugs; and that said amount shall be distributed among said Cherokee Indians as provided by an act of the Cherokee national council, approved November nineteenth, eighteen hundred and seventy-four, and shall be immediately available.

16. Of the total sum of $1,650,600 "or so much thereof as may be necessary" appropriated by the Act of March 3, 1873, 17 Stat. 538 (see finding 15), $1,099,137.41 was ultimately set up on the books of the United States Treasury to the credit of the Cherokee Nation in payment for the land purchased by the Osages from the Cherokees. That Act provided that the amount placed to the credit of the Cherokee Nation should bear interest at five per cent "whenever the amount to be so transferred shall be certified to the said Secretary of Treasury by the Secretary of the Interior." When the requisite certification was made does not appear from the evidence. The United States computed interest from June 12, 1873, with deductions from the principal for the following withdrawals from the fund: $80,000 was withdrawn October 4, 1873, and at or about that time was invested in interest-bearing securities as a part of the Cherokee Nation orphan fund as provided by the Act of February 14, 1873, 17 Stat. 462 (see finding 15); $95,000 was paid in cash to the Cherokee Nation on April 25, 1874, also as provided by the Act of February 14, 1873, for the construction of buildings referred

to in that Act; and $200,000 was expended from the fund under the provisions of the Act of March 3, 1875, 18 Stat. 451, which authorized the expenditure for purchasing breadstuffs for the Cherokee Nation. (See finding 15.) The last amount was transferred for that purpose May 15, 1875, and the expenditure was made during the fiscal year ended June 30, 1875.

The defendant computed interest on the principal sum of $1,099,137.41, after allowance for the above disbursements, as follows:

	Interest	Date paid
$996,748.80 [1] @ 5% from June 12, 1873 to June 11, 1874	$49,837.44	June 30, 1873
$921,748.80 [2] @ 5% from June 12, 1874 to Jan. 1, 1875	21,692.79	Mar. 5, 1875
$921,748.80 @ 5% from Jan. 1, 1875 to March 3, 1875, and $721,748.80 [3] @ 5% from March 3, 1875 to July 1, 1875	19,714.75	Apr. 14, 1875
$721,748.80 @ 5% from July 1, 1875 to Jan. 1, 1876	18,043.72	June 29, 1876
$721,748.80 @ 5% from Jan. 1, 1876 to July 1, 1876	18,043.72	Aug. 9, 1876
$721,748.80 @ 5% from July 1, 1876 to Jan. 1, 1877	18,043.72	Feb. 6, 1877
$721,748.80 @ 5% from Jan. 1, 1877 to July 1, 1877	18,043.72	July 27, 1877
$721,748.80 @ 5% from July 1, 1877 to Jan. 1, 1878	18,043.72	Jan. 30, 1878
$721,748.80 @ 5% from Jan. 1, 1878 to July 1, 1878	18,043.72	July 1, 1878
$721,748.80 @ 5% from July 1, 1878 to Jan. 1, 1879	18,043.72	Jan. 22, 1879
$721,748.80 @ 5% from Jan. 1, 1879 to July 1, 1879	18,043.72	July 1, 1879
$721,748.80 @ 5% from July 1, 1879 to Jan. 1, 1880	18,043.72	Jan. 15, 1880
$721,748.80 @ 5% from Jan. 1, 1880 to July 1, 1880	18,043.72	July 1, 1880
$2,388.61 @ 5% from to July 1, 1880	[4] 39.92	July 1, 1880
$724,137.41 @ 5% from July 1, 1880 to Jan. 1, 1881	18,103.44	Jan. 3, 1881
$724,137.41 @ 5% from Jan. 1, 1881 to July 1, 1881	18,103.44	July 1, 1881
$724,137.41 @ 5% from July 1, 1881 to Jan. 1, 1882	18,103.44	Jan. 17, 1882
$724,137.41 @ 5% from Jan. 1, 1882 to July 1, 1882	18,103.44	July 1, 1882
$724,137.41 @ 5% from July 1, 1882 to Jan. 1, 1883	18,103.44	Jan. 18, 1883
$724,137.41 @ 5% from Jan. 1, 1883 to July 1, 1883	18,103.44	July 2, 1883
$724,137.41 @ 5% from July 1, 1883 to Jan. 1, 1884	18,103.44	Jan. 12, 1884
$724,137.41 @ 5% from Jan. 1, 1884 to July 1, 1884	18,103.44	July 17, 1884
$724,137.41 @ 5% from July 1, 1884 to Jan. 1, 1885	18,103.44	Jan. 19, 1885
$724,137.41 @ 5% from Jan. 1, 1885 to July 1, 1885	18,103.44	July 31, 1885
$724,137.41 @ 5% from July 1, 1885 to Jan. 1, 1886	18,103.44	Jan. 21, 1886
$724,137.41 @ 5% from Jan. 1, 1886 to July 1, 1886	18,103.44	July 1, 1886
$724,137.41 @ 5% from July 1, 1886 to Jan. 1, 1887	18,103.44	Jan. 12, 1887
$724,137.41 @ 5% from Jan. 1, 1887 to July 1, 1887	18,103.44	July 1, 1887
$724,137.41 @ 5% from July 1, 1887 to Jan. 1, 1888	18,103.44	Jan. 12, 1888
Total	543,273.90	

[1] This amount represents the total principal sum of $1,099,137.41 less two amounts of $100,000 and $2,388.61. The amount of $100,000 represents a sum which the Act of February 14, 1873, 17 Stat. 462, provided should be set apart from these funds, $80,000 of which was to be invested as a part of the orphan fund and $20.000 to be expended for a building for orphans. The small amount of $2,388.61 was credited to the principal fund in 1880, but whether it represented a small amount received for land sold after the first certification of funds or something else does not appear from the evidence.

[2] In addition to the deduction of $100,000 explained above, the defendant made a further deduction of $75,000 from the interest-bearing principal fund when it came to make the second interest computation. The Act of February 14, 1873, provided that that amount should be expended from these funds for the establishment of a literary institution. That amount and the $20.000 referred to in the first footnote were paid in cash to the Cherokee Nation on April 25, 1874, and the funds were later expended for the purpose for which they had been set apart. Since the amount of $75,000 was included in the principal sum for the first interest computation and the defendant determined that it should not have been so included, a deduction was made by the defendant for the excess interest which it considered it had paid under the first interest computation.

[3] The reduction of the principal fund from $921,748.80 to $721,748.80 as of March 3, 1875, was made on the basis of the Act of March 3, 1875, which authorized the expenditure of $200,000 from these funds for breadstuffs for the Cherokee Nation.

[4] The evidence does not show the period for which this interest was computed but the amount ($2,388.61) was added to the principal fund prior to July 1, 1880. From July 1, 1880, interest was computed on the increased fund $724,137.41 ($721,748.80 +$2.388.61) until that amount was transferred to other interest-bearing funds of the Cherokee Nation on January 3, 1888.

Plaintiff contends that the interest should have been computed in the following manner:

Date	Principal	Payments	Balance	To—	Period	Interest
Mch 3, 1873	$1,099,137.41		$1,099,137.41	Oct. 3, 1873	215 days	$32,371.85
Oct. 4, 1873		$80,000.00	1,019,137.41	Apr. 26, 1874	205 days	28,619.61
Apr. 27, 1874		95,000.00	924,137.41	May 14, 1875	1 year, 18 days	48,485.57
May 15, 1875		200,000.00	724,137.41	Dec. 31, 1887	12 years, 231 days	457,396.93
Dec. 31, 1887		724,137.41				
						566,873.96

The difference between the amount as computed and paid by the United States and that now computed by plaintiff is $23,600.06.

17. The Act of June 16, 1880, 21 Stat. 248, appropriated $300,000 out of the funds due the Cherokee Nation from the United States for its lands west of the Arkansas River which amount was to be expended to relieve destitution of the Cherokee Nation caused by drought. That amount was made available for the use for which appropriated by requisition dated June 21, 1880. The Act of March 3, 1883, 22 Stat. 624, appropriated $300,000 out of similar funds as the Act just referred to, which amount was to be expended as the acts of the Cherokee Legislature directed and to be immediately available. That amount was set up on the books of the United States Treasury by warrant dated March 7, 1883, and paid to the Cherokee Nation on June 13, 1883.

The Act of October 19, 1888, 25 Stat. 608 (see finding 20), appropriated $75,000 out of money due the Cherokee Nation on account of the sale of its lands west of the Arkansas River. That amount was to be used, under the conditions stated in the Act, to satisfy per capita payments owing by the Cherokee Nation to the Delaware and Shawnee Indians and certain Cherokee Freedmen. The amount was set up on the books of the United States Treasury by warrant dated March 2, 1889, and thereafter, upon requisitions issued from time to time by the United States Indian Agent, was transferred for disbursement as provided in this Act.

In order to pay the expenses of the Secretary of the Interior in ascertaining the persons entitled to share the per capita payments referred to in the preceding paragraph, the Act of March 2, 1889, 25 Stat. 994, appropriated $5,000. That amount was set up on the books of the United States Treasury by warrant dated July 1, 1889, and thereafter, upon requisitions issued from time to time by the United States Indian Commissioner and United States Indian Agent, was transferred for disbursement as provided in the Act.

By the Act of March 3, 1893, 27 Stat. 612, 640 (set out in finding 18), the Congress ratified an agreement between the United States and the Cherokee Nation for the acquisition by the former from the latter of certain undisposed of lands in the Cherokee Outlet. In order to carry out that agreement the sum of $295,736 was appropriated by that Act and,

in addition, the Secretary of the Interior was authorized and directed to pay $8,300,000, or so much thereof as might be necessary, for the lands in question. The Act further provided that the amount of $295,736 should be immediately available and that the sum of $8,300,000 should be payable in five equal annual installments, commencing on March 4, 1895, the deferred payments to bear interest at 4 percent per annum. The Act of March 2, 1895, 28 Stat. 876, 894, appropriated $1,660,000 for the first installment of the deferred payments provided by the Act of March 3, 1893, just referred to. See finding 18 in regard to the Acts of 1893 and 1895. The $1,660,000 was to be used, so far as necessary, to pay the Delaware and Shawnee Indians and the Freedmen of the Cherokee Nation their pro rata share in the proceeds of the lands in question. The $295,736 appropriated by the Act of March 3, 1893, was paid to the Cherokee Nation June 29, 1893. The $1,660,000 appropriated by the Act of March 2, 1895, was set up on the books of the United States Treasury to the credit of the Cherokee Nation on March 4, 1895, and, as shown in finding 18, was thereafter disbursed to the Delawares, Shawnees, Cherokee Freedmen and Cherokees, except that $2,181.21 was disbursed, as shown in finding 19, to pay expenses of the distributions to the Shawnees and the Freedmen.

18. On December 19, 1891, the Cherokee Nation and the United States entered into an agreement under which the former relinquished its right to a large tract of land in Oklahoma known as the Cherokee Outlet. Ex. Doc. 56, 52nd Congress, 1st Session. That agreement was ratified by the Act of Congress of March 3, 1893, 27 Stat. 612, 640, which Act contained the following provisions:

> SEC. 10. That the sum of two hundred and ninety-five thousand Seven Hundred and thirty-six dollars payable as hereinafter provided is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the Secretary of the Interior is hereby authorized and directed to contract to pay eight million three hundred thousand dollars, or so much thereof as may be necessary in addition, to pay the Cherokee Nation of Indians for all the right, title, interest, and and [any]

claims which the said nation of Indians may have in and to certain lands described and specified in an agreement concluded between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed commissioners, on the part of the United States, and Elias C. Boudinot, Joseph A. Scales, George Downing, Roach Young, Thomas Smith, William Triplett, and Joseph Smallwood, duly appointed commissioners on the part of the Cherokee Nation of Indians in the Indiana Territory, on the nineteenth day of December, eighteen hundred and ninety-one, bounded on the west by the one hundredth degree of west longitude; on the north by the state of Kansas; on the east by the ninety-sixth degree of west longitude, and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapaho Reservation, created or defined by Executive order dated August tenth, eighteen hundred and sixty-nine; which said agreement is fully set forth in the message of the President of the United States, communicating the same to congress, known as Executive Document Numbered Fifty-six, of the first session of the Fifty-second Congress, the lands referred to being commonly known and called the "Cherokee Outlet;" and said agreement is hereby ratified by the Congress of the United States, subject, however, to the Constitution and laws of the United States and the acts of Congress that have been or may be passed regulating trade and intercourse with the Indians, and subject, also, to certain amendments thereto, as follows:

* * * * *

And the provisions of said agreements so amended shall be fully performed and carried out on the part of the United States: *Provided*, That the money hereby appropriated shall be immediately available and the remaining sum of eight million three hundred thousand dollars or so much thereof as is required to carry out the provisions of said agreement as amended and according to this act, to be payable in five equal annual installments, commencing on the fourth day of March, eighteen hundred and ninety-five, and ending on the fourth day of March, eighteen hundred and ninety-nine, said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated: *And provided further*, That of the money hereby appropriated a sufficient

> amount to pay the Delawares and Shawnees their pro rata share in the proceeds of said outlet shall remain in the Treasury of the United States until the status of said Delaware and Shawnee Indians shall be determined by the courts of the United States before which their suits are now pending; and a sufficient amount shall also be retained in the Treasury to pay the freedmen who are citizens of the Cherokee Nations or their legal heirs and representatives such sums as may be determined by the courts of the United States to be due them.

The Act of March 2, 1895, 28 Stat. 876, 894, appropriated $1,660,000, for the first installment of the deferred payments due March 4, 1895, as provided by the Act of March 3, 1893. The provision making the appropriation read as follows:

> For the payment of the first installment due on the fourth day of March eighteen hundred and ninety-five to the Cherokee Nation, under the provisions of the Act of March third, eighteen hundred and ninety-three, for the purchase of the "Cherokee Outlet", the sum of one million six hundred and sixty thousand dollars: *Provided*, That said sum shall be held subject to the payment of the Delaware and Shawnee Indians and the Cherokee Freedmen as provided by the tenth section of said Act to be available immediately after March fourth, eighteen hundred and ninety-five.

The installment of $1,660,000, referred to in the above Act, was deposited in the United States Treasury on March 4, 1895, to the credit of the Cherokee Nation for payment to the Delawares, Shawnees and Freedmen and interest thereon was terminated on that date. The amount so deposited was disbursed to the Delawares, Shawnees and Freedmen over the period April 9, 1895, to May 9, 1921, approximately 98 percent of it being paid within the first five years. Interest on the installment payment of $1,660,000 was computed by the United States at 4 percent from March 3, 1893, to March 4, 1895, and paid to the Cherokee Nation, but no interest was computed by the United States or paid to the Cherokee Nation on that amount after March 4, 1895.

19. During the period from December 31, 1896, to May 5, 1904, the Secretary of the Interior made a per capita payment of $185.57 to each of the Shawnees and distributed a total

of $153,281.11. The expenses of the per capita payment were $28.55. During the period from March 31, 1897, to July 9, 1908, the Secretary of the Interior made a per capita payment of $188.75 to each of the Freedmen and distributed a total of $835,010.21. The expenses of the per capita payment were $2,152.66. The total expenses of $2,181.21 were charged to the fund of $1,660,000 appropriated by the Act of March 2, 1895, for payment of the claims of the Delaware and Shawnee Indians and the Cherokee Freedmen. See finding 18. No expenses were charged for the distribution of $174,074.44 to the Delawares.

The expenses of per capita payments were disbursed as follows:

Date	Payee	Amount
Dec. 31, 1896	Jas. G. Dickson	$875.99
Mar. 31, 1897	Same	470.46
June 30, 1897	Jas. G. Dickson and D. M. Wisdom	527.45
July 20, 1897	U. S. Express Co	16.40
July 28, 1897	Thos. J. Watts	57.60
Aug. 13, 1897	C. & O. R. R. Co	51.65
Sept. 30, 1897	Jas. G. Dickson	24.62
Oct. 8, 1897	R. W. Walker	38.00
Oct. 21, 1897	C. & O. R. R. Co. and Penna. R. R. Co	70.81
Mar. 7, 1898	Wm. V. Casey	33.12
Sept. 30, 1898	Jas. G. Dickson	15.11
Total		2,181.21

20. October 19, 1888, there was approved an Act of Congress, 25 Stat. 608, 609, reading in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is appropriated, out of any money in the Treasury not otherwise appropriated, the sum of seventy-five thousand dollars, or so much thereof as may be necessary, to carry out the provisions of this act; and the amount actually expended shall be charged against the Cherokee Nation, on account of its lands west of the Arkansas River, and shall be a lien on said lands, and which shall be deducted from any payment hereafter made on account of said lands. The said sum, or so much thereof as may be necessary, shall be by the Secretary of the Interior distributed per capita, first, among such freedmen and their descendants as are mentioned in the ninth article of the treaty of July nineteenth, eighteen hundred

and sixty-six, between the United States and the Cherokee Nation of Indians; second, among the Delaware tribe of Indians incorporated into the Cherokee Nation by the terms of a certain agreement entered into between said Cherokee Nation and Delaware Indians, under the provisions of the fifteenth article of the aforesaid treaty, on the eighth day of April, eighteen hundred and sixty-seven, and approved, respectively, by the President of the United States and the Secretary of the Interior on the eleventh day of April, eighteen hundred and sixty-seven; and, third, among the Shawnee tribe of Indians incorporated into the Cherokee Nation by the terms of a certain agreement entered into between the said Cherokee Nation and Shawnee Indians, under the provisions of the aforesaid article and treaty, on the seventh day of June, eighteen hundred and sixty-nine, and approved, respectively, by the President of the United States and the Secretary of the Interior on the ninth day of June, eighteen hundred and sixty-nine, in such manner and in such amount or amounts as will equalize the per capita payment made to Cherokees by blood in accordance with the act of the Cherokee legislature aforesaid, out of the sum of three hundred thousand dollars appropriated by the act of March third, eighteen hundred and eighty-three, aforesaid.

Approved, October 19, 1888.

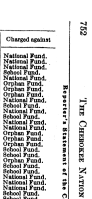
The sum of $75,000 was applied to the payment by the United States for the cession of the Cherokee Outlet. Subsequently per capita payments of $15.50 were made to the Freedmen, Delawares, and Shawnees amounting to a total of $71,858, as follows:

Freedmen	$49, 553. 50
Delawares	11, 501. 00
Shawnees	10, 803. 50
	71, 858. 00

The balance, $3,142, was returned to the United States Treasury as Surplus on June 30, 1923, on Surplus Warrant No. 88.

The last per capita payment was made March 17, 1906.

21. The following statement shows various disbursements which were charged against Trust Funds of the Cherokee Nation and which plaintiff contends were improper:




Date	Agent	Purpose	Amount	Charged against
Oct. 4, 1837	Comr. Indian Affairs	Fee for protest	$2.74	National Fund.
Sept. 30, 1862	Peter B. Elder	Tobacco	11.25	National Fund.
Sept. 30, 1862	Same	Provisions	1,239.99	National Fund.
Dec. 31, 1863	Wm. G. Coffin	Services of messenger carrying dispatches	10.00	School Fund.
June 30, 1863	Same	Salary of special agent	250.00	National Fund.
Sept. 30, 1863	Same	Salary of clerk	374.62	Orphan Fund.
Sept. 30, 1863	Same	Salary of special agent	227.60	Orphan Fund.
June 30, 1863	Same	Tax on salary	2.40	Orphan Fund.
Dec. 31, 1863	Justin Harlan	Rent and firewood for agency	16.75	National Fund.
June 30, 1863	Wm. G. Coffin	Traveling expenses of clerks	43.10	School Fund.
Mar. 31, 1863	Justin Harlan	Stationery for agency	25.85	National Fund.
Dec. 31, 1863	Wm. G. Coffin	Salary and tax on special agent	232.50	School Fund.
Mar. 31, 1863	Justin Harlan	Star candles for agency	11.00	National Fund.
June 30, 1863	Same	Services for guide	6.00	National Fund.
June 30, 1863	Wm. G. Coffin	Traveling expenses of clerks	33.50	Orphan Fund.
June 30, 1863	Same	Traveling expenses of physician	25.40	Orphan Fund.
June 30, 1863	Same	Harness for physician	35.00	Orphan Fund.
June 30, 1863	Same	Blacksmithing for physician	3.70	School Fund.
June 30, 1863	Same	Stationery and supplies for agency	10.50	School Fund.
June 30, 1863	Same	Horse feed for agent's team	10.00	Orphan Fund.
Sept. 30, 1863	Justin Harlan	Repairs to agency buildings	12.00	School Fund.
Dec. 31, 1863	Same	Traveling expenses of agent	24.52	School Fund.
Dec. 31, 1863	Same	Hay for agency	30.00	National Fund.
Dec. 31, 1863	Same	Firewood for agency	9.12	National Fund.
Mar. 31, 1866	Elijah Sells	Telegrams to agency	23.62	National Fund.
Dec. 31, 1865	Justin Harlan	Board of special agent	78.00	School Fund.
Mar. 31, 1866	Same	Same	78.00	School Fund.
Mar. 31, 1866	Elijah Sells	Seeds for other tribes	490.50	National Fund.
Aug. 29, 1866	Comr. Indian Affairs	Proceeds of Kentucky 5% bonds of P. V. $88,000 at cost of $91,771.82, invested in U. S. 6% bonds of P. V. $88,000 at cost of $91,273.50; $335.39 of balance transferred to interest account and $162.93 paid for expenses, commission $45.13, express $29.49, and bank charges $88.31.	162.93	National Fund.
Dec. 31, 1866	Justin Harlan	Blankets for Creeks and Seminoles	234.00	School Fund.
Jan. 23, 1869	Same	Taxes on salaries	47.75	National Fund.
Jan. 26, 1898	Sec'y of Interior	Proceeds of sale of U. P. 6% bonds $201,000.01 deposited as $201,000.00	.01	National Fund.
Total			3,762.35	

22. The following disbursements were made by the United States from interest due on trust funds of the Cherokee Nation which the plaintiff claims were unlawful:

Date	Agent	Purpose	Amount
NATIONAL FUND			
June 30, 1866	Justin Harlan	Traveling expenses of Creeks and Seminoles.	$904.50
July 20, 1860	G. Bailey	Traveling expenses of agent	3.00
June 30, 1866	Justin Harlan	Traveling expenses of agent	811.75
June 30, 1866	Elijah Sells	Traveling expenses of agent	135.50
Sept. 30, 1863	Wm. G. Coffin	Candles for agent	10.00
Sept. 30, 1863	Same	Soap for agent	37.17
Dec. 31, 1863	Same	Same	22.40
June 30, 1863	Justin Harlan	Blacksmithing	1.25
June 30, 1863	Wm. G. Coffin	Repairs to guns	54.00
Sept. 30, 1863	Same	Ammunition	31.70
June 30, 1863	Same	Error in agent's accounts	1.50
SCHOOL FUND			
June 30, 1863	Justin Harlan	Blacksmithing	5.00
Dec. 31, 1899	John D. Benedict	Error in agent's accounts	.03
Mar. 31, 1917	Wm. M. Baker	Same	104.07
ORPHAN FUND			
Sept. 30, 1912	Geo. W. Evans	Eastern Cherokees of N. C.	13.50
			2,135.37

In addition, certain other expenditures were made by the United States from the interest due on these trust funds which plaintiff claims were unlawful:

Date	Purpose	Amount
NATIONAL FUND	Relief of refugee Indians:	
1863	Quapaws	$1,251.24
1863	Wichitas	5.00
1864	Seminoles	7,051.41
1863	Cherokees jointly with other Indians	2,712.83
1863	Southern refugee Indians	2,735.87
1864	Same	100.00
1863	Tribes not designated	4,548.19
1864	Same	54,561.00
1866	Same	559.60
1867	Same	1,096.21
	Pay of miscellaneous employees (Education)	2,095.00
June 30, 1891	Surplus Warrant No. 43	271.56
SCHOOL FUND	Relief of refugee Indians:	
1863	Cherokees and Kickapoos	1,026.87
1864	Cherokees jointly with other Indians	1,935.20
1863	Tribes not designated	3,647.10
1864	Same	4,573.45
1866	Same	50,450.15
1867	Same	3,000.00
	Pay of miscellaneous employees (Education)	8,116.43
June 30, 1891	Surplus Warrant No. 43	504.33
June 30, 1930	Balance in U. S. Treasury	12.30
ORPHAN FUND	Relief of refugee Indians:	
1863	Southern refugee Indians	1,460.09
1864	Same	124.90
	Pay of miscellaneous employees (Education)	22,909.50
Total		174,748.23

23. Included among the disbursements made by the United States for the benefit of the Cherokee Nation of Indians pursuant to, or from moneys credited to said nation pursuant to, the Act of June 28, 1898, 30 Stat. 495; the Act of July 1, 1902, 32 Stat. 716; the Act of April 26, 1906, 34 Stat. 137; and the Act of March 3, 1911, 36 Stat. 1070, during the period from June 28, 1898, to June 30, 1930, were the following:

Pay of miscellaneous employees	$40, 608. 62
Per diem and travel allowance of Indian police on special duty in connection with tribal affairs	5, 378. 26
Expenses of collecting revenue	30, 890. 41
Expenses incurred by the Cherokee Nation in opposing petitions for enrollment before the Dawes Commission:	
Pay and expenses of attorneys	1, 693. 05
Per diem and expenses of witnesses	7, 646. 31
Expenses of making per capita payments	12, 317. 90
Expenses of making payments to destitute Cherokees	729. 32
Suppression of smallpox in the Cherokee Nation	5, 804. 62
Miscellaneous agency expenses	1, 547. 53
Total	106, 616. 02

24. Certain Acts of Congress made appropriations for the Cherokee Nation as follows:

Act of September 30, 1850, 9 Stat. 544, 556:

> To the "old settlers," or "Western Cherokees," in full of all demands, under the provisions of the treaty of sixth August, eighteen hundred and forty-six, according to the principles established in the fourth article thereof, five hundred and thirty-two thousand eight hundred and ninety-six dollars and ninety cents; and that interest be allowed and paid upon the above sums due respectively to the Cherokees and "old settlers," in pursuance of the above-mentioned award of the Senate, under the reference contained in the said eleventh article of the treaty of sixth August, eighteen hundred and forty-six: *Provided*, That in no case shall any money hereby appropriated be paid to any agent of said Indians, or to any other person or persons than the Indian or Indians to whom it is due: *Provided, also*, That the Indians who shall receive the said money shall first respectively sign a receipt or release, acknowledging the same to be in full of all demands under the fourth article of said treaty.

Act of February 27, 1851, 9 Stat. 570, 573:

> For expenses of an agent to collect information to enable the department to execute the law of Congress providing for the per capita payment to Cherokees, under the treaty of eighteen hundred and thirty-five, so

far as relates to those Indians east of the Mississippi, one thousand five hundred dollars.

Unexpended balances from the above appropriations and not shown by the record to have been accounted for are as follows:

Act of September 30, 1850	$137.13
Act of September 30, 1850	148.49
Act of September 30, 1850	211.50
Act of February 27, 1851	512.68
Total	1,009.80

In addition certain unexpended balances were returned to the United States Treasury as surplus as follows:

Appropriation Act	Date returned to the Treasury	Amount
Act of Sept. 30, 1850	June 30, 1865	$201.11
Act of Feb. 27, 1851	June 30, 1855	.08
Act of Feb. 27, 1851	June 30, 1865	366.10
		567.29

OFFSETS

25. The United States has spent, gratuitously, various sums for the benefit of the Cherokee Nation. One of those sums is $142,066.22 spent for aid to common schools for the Cherokees, out of an appropriation of $400,000 made by the Act of April 22, 1932, 47 Stat. 107. This expenditure is shown at page 53 of the Report of the General Accounting Office under the Act of August 12, 1935, 49 Stat. 571, 596, filed in this court September 22, 1937. The sum of $25,-240.72, a part of the $142,066.22 so gratuitously expended, is a proper offset against the claim of the plaintiff in this case.

The court decided that, but for the offset of $146,066.22 to which the defendant is entitled under the Act of August 12, 1935, for funds gratuitously expended for plaintiff's benefit, the plaintiff would be entitled to recover the sum of $25,240.72; and the court further decided that in the instant cases, the defendant was entitled, out of the said $146,066.22, to an offset of $25,240.72; and the petitions were accordingly dismissed.

MADDEN, *Judge*, delivered the opinion of the court:

These suits were brought by the Cherokee Nation of Indians pursuant to a Special Act of Congress which is quoted in finding 1. That act confers jurisdiction upon this court to adjudicate claims of the plaintiff arising out of any treaty or agreement of the plaintiff with the United States, or any act of Congress, except claims heretofore "determined and adjudicated on their merits" by this court or the Supreme Court of the United States. Thus the dealings between the Cherokees and the United States from 1791 down to date, are open for examination in these suits. The plaintiff's accountants have made an exhaustive examination of the pertinent records, and the plaintiff claims that the evidence obtained by this examination and presented to the court shows that the Government has not fulfilled its obligations to the Cherokees in many different and unrelated transactions. The Government denies that there has been any such failure, except in one instance. We consider, therefore, the several items of the plaintiff's claims.

I.

Our findings 2 and 3 relate to the first item of the plaintiff's claim. In 1794 the United States, in a treaty with the Cherokees, promised to furnish the Cherokees, annually, with goods to the value of $5,000. In 1798 it promised, in addition, to furnish them, annually, goods to the value of $1,000. These promises remained in force until 1835 when by another treaty, the annuities were commuted by a cash payment of $214,000. The Indians claim that the records do not show that the United States furnished goods to the extent promised in each of the years that the treaties were in force. In finding 3 we have found that, as to the amount of $12,-853.29, there is not satisfactory proof of payment.

The Government urges that it is not strange that records should be lacking or incomplete after a lapse of some 150 years, especially considering the somewhat primitive methods of keeping records which were current at the time in question. Because of what we say in the next paragraph, it is not necessary for us to determine which party has the burden of proof on this item of the claim.

In the last paragraph of finding 2 we have shown that Article VIII of the Treaty of August 6, 1846 contained this language:

> The United States agree to pay to the Cherokee nation * * * the further sum of twenty thousand dollars, in lieu of all claims of the Cherokee nation, as a nation, prior to the treaty of 1835, except all lands reserved, by treaties heretofore made, for school funds.

If, in fact, the United States had fallen short in its delivery of goods pursuant to the annuity provisions of the treaties of 1794 and 1798, this provision seems to have been a complete compromise and settlement of any claim for such deficiencies. No reason appears for our going behind that settlement. The plaintiff has, therefore, no right to recover on this item of its claim.

II.

Our findings 4, 5, 6, and 7 relate to a school fund which, under the Treaty of February 27, 1819, was to be set up for the Cherokees. In that treaty one described tract "twelve miles square" was ceded to the United States, to be sold by it and the proceeds invested in a school fund for the Cherokees. The United States caused the tract to be surveyed, and sold it in parcels, some as late as 1923. The plaintiff claims that the acreage sold and accounted for is only 89,111.94 acres, whereas a tract twelve miles square would contain 92,160 acres. Hence, the plaintiff says, the United States is short in its accounts as a trustee. But the tract was not a perfect square, since, as described in the cession, it was bounded on one side by the Tennessee River. Besides, two tributaries of that river flowed through the tract, and made unsalable some of its acreage. We do not know how many acres of salable land the tract contained, hence we do not find that the United States has accounted for less acres than were conveyed to it. The plaintiff says that three parcels of land, containing 1,742.94 acres were not sold, but should have been, and should be accounted for. We cannot determine from the evidence whether these three parcels passed into private ownership before or after the cession of the tract in 1819. If they were already in private ownership when the cession was made, the

United States, as a grantee in trust, never became liable to account for them, since they did not pass to it by the cession, as they did not belong to the grantors, the Cherokees. We conclude, therefore, that there is no proved deficiency in the number of acres accounted for by the United States in the school fund tract.

The plaintiff complains that some of its school land funds were spent, during the period from 1863 to 1867, for the relief of destitute Indians of other tribes. See finding 7. During the war between the states, the Cherokee Nation entered into an alliance, "offensive and defensive" with the Confederacy, and many of its members took up arms against the United States. Many Cherokees who remained loyal to the United States were driven from their homes and became destitute. Congress in 1862, 1863, 1864 and 1865 provided for the postponement, if directed by the President, of appropriations to carry into effect the provisions of treaties with the unfriendly Indian tribes, and for the use of certain of such funds for the relief of refugee loyal Indians. In the administration of these acts the funds of one tribe were often used for the relief of refugees of other tribes. We have found that $669.05 of Cherokee funds were used for the relief of Wichita and Seminole Indians, and that $2,161.12 of Cherokee funds were used for the benefit of Indians of "tribes not designated." We have also found that the money of other tribes was used for the relief of refugee Cherokees. Under the acts referred to above the Secretary of the Interior was required to report to Congress his action in the expenditure of the funds for the relief of refugee loyal Indians, and though his reports must have shown that the funds of the tribes were used for the relief of Indians not members of the tribe whose funds were used, Congress continued to include similar provisions in the later acts, thus, apparently approving the Secretary's interpretation of the acts.[1] An amendment offered in the Senate which would have limited the expenditure of the funds of a hostile tribe to the relief of the members of that tribe was not accepted.[2] It would

[1] See Cong. Globe, 37th Cong., 2d sess., pp. 2093, 2098; id. 38th Cong., 1st sess., p. 2869, for manifestations in the debates of the attitude of Congress toward the hostile tribes.

[2] Cong. Globe, 37th Cong., 2d sess., pp. 2122–2124.

seem, then, that the intent of the acts of Congress passed during the war period was to divert these funds of the hostile tribes to the relief of the loyal Indians. Congress had the power to so deal with the property of hostile tribes.

A Treaty was made July 19, 1866, 14 Stat. 799, between the United States and the Cherokees. Article XXXI of that treaty reaffirmed and declared to be in full force all provisions of former treaties, not inconsistent with that treaty, and provided that:

> Nothing herein shall be construed as an acknowledgment by the United States, or as a relinquishment by the Cherokee Nation of any claims or demands under the guarantees of former treaties except as herein expressly provided.

We think that the expenditure of a part of the Cherokees' funds for the relief of destitute loyal Indians of other tribes, while the Cherokees were in a state of hostility to the United States, did not, under the relevant acts of Congress and the Treaty of July 19, 1866, create any liability on the part of the United States to restore the amounts so expended to the Cherokees' funds.

III.

Our finding 8 is that on June 30, 1891 the Secretary of the Interior withdrew $504.33 from the Cherokee school funds and returned it to the United States Treasury. The Government contends that because there is nothing in either of the plaintiff's petitions in these cases relating to this claim, we should not consider it. The plaintiff urges that its prayer, in the last paragraph of its petition in L–268, for an accounting, and for such other or additional amounts as the accounting may show, brings this claim within the scope of the petitions. But in the preceding paragraph, the plaintiff says that its accountants had worked on the accounts between the United States and the Cherokee Nation for four and one-half years before the petitions were written, "by reason of which work plaintiff has been able to present to this Court its claims in definite form, and with few exceptions has been able to make claim for specific or determinable amounts of money." The plaintiff then says that the accounting prayed for "is intended

by plaintiff to be confined to a full and complete accounting of and on the several matters set up in this petition."

In preparing its defense, the Government called upon its General Accounting Office to furnish it an accounting in response to the claims made in the plaintiff's petitions. The preparation of such an accounting required several years' work. We think it is not fair to the Government to ask for a judgment on the basis of an item which, on the face of the account, seems to indicate a liability on the part of the Government, but which might well be explained if studied by accountants aware that a claim was being based upon it. The only way to prevent this unfairness would be to remand the case for a further accounting. We are not willing to do this, in view of the time that has elapsed since these petitions were filed. We conclude that no recovery may be had upon the item contained in our finding 8.

IV.

The plaintiff claims $9,131.77, an amount deducted by the Secretary of the Interior from the gross proceeds of the so-called Strip Lands in Kansas which had belonged to the Cherokees but were, under the provisions of the Treaty of July 19, 1866, sold by the United States to settlers as public lands, and the proceeds invested in United States bonds as trust funds of the Cherokees. The Secretary's deduction was for the expenses of the sale of the lands, consisting of advertising, expense of depositing, fees and commissions, and office expense. See finding 11. The Secretary also deducted $13,347.97 from the gross proceeds of the land as the cost of having the lands surveyed. The plaintiff makes no claim on account of this latter deduction. The Government justifies the contested deduction of the expenses of sale on the ground that it was acting as a trustee for the Cherokees in selling the lands for them and investing the proceeds for their benefit, and that therefore it should not have to pay, out of its own pocket, expenses necessarily incurred for their benefit. The Cherokees contend that the transaction was not merely for the benefit of the Indians, but was for the benefit of the United States in the arrangement of its political affairs and the opening of the lands to white settlers. They assert that

the express provision in the third paragraph of Article XVII of the Treaty of 1866, quoted in finding 9, "the expenses of survey and appraisement to be paid by the Secretary out of the proceeds of sale of said land" negatives any implication which might otherwise exist that all necessary expenses incident to the sale of the land should be borne by the beneficiary, the Cherokees. The quoted language does not seem to be a generally applicable provision in the treaty, but a part of a proviso relating to the sale of particular tracts to persons already settled upon them. We think, therefore, that the *expressio unius* argument is not applicable. If it were, it would prove much more than the plaintiff contends for, viz., that even the expenses of survey were not properly deductible, except in the particular cases covered by the proviso in which the quoted language appears. We find in the quoted language no dependable indication that the makers of the treaty intended the United States to bear the expenses of the sale of the lands.

In the absence of any showing of intention to the contrary, we think the United States had the usual right of a trustee and could reimburse itself out of the trust funds for its necessary out-of-pocket expenses in the administration of the trust. In addition, R. S. 2093 seems to provide expressly for the deduction of such expenses from the proceeds of the sale of such lands. It may be observed that by R. S. 2115 and 23 Stat. 76, 98, § 10, these expenses were made non-deductible after 1884.

The fact that the Cherokees accepted the Slade and Bender account, the story of which is recounted in findings 12 and 13, which account showed the deduction here complained of included in a combined deduction for "Expenses of survey and sale" (see finding 13) is some indication, not very strong, that the leaders of the Cherokees then thought that, under the Treaty of 1866, the Government was not bound to bear the expense of selling the land. The Government urges that the Slade and Bender account, and the facts relative thereto, are a complete bar to the plaintiff's maintaining practically all of the claims asserted in these cases. We disagree, but defer discussion of this question to the end of this opinion.

V.

The plaintiff claims that it should have been paid interest on $48,389.46, the amount for which the United States sold some of the plaintiff's lands to the Ponca Indians, from March 3, 1881, instead of from November 17, 1881. The facts are recited in finding 14. March 3 was the date on which Congress appropriated $50,000 for the purchase. November 17 was the date when the $48,389.46 was deposited in trust for the Cherokees in the Treasury. Presumably, by this time, the Poncas and the Cherokees had agreed on the price, but there is no proof as to when they agreed. The formal agreement between them ratifying the sale was dated June 14, 1883.

We think that the appropriation, by Congress, of $50,000 for the purchase of the land from the Cherokees, did not entitle the Cherokees to interest until the purchase was in fact made and the price agreed on. The plaintiff may not recover on this item of its claim.

VI.

The United States, by agreement with the Cherokees, sold some of their lands to the Osage Tribe of Indians and agreed to put the proceeds of the sale into an interest-bearing trust fund for the Cherokees. The Cherokees claim that interest should have been paid them on the sale price of the lands, $1,099,137.41 from March 3, 1873, the date when Congress appropriated $1,650,600 "or so much thereof as might be necessary" to buy lands from the Cherokees for the Osages. This claim is not valid because the appropriation act expressly provided that interest should begin "whenever the amount to be so transferred shall be certified to the said Secretary of the Treasury by the Secretary of the Interior." Finding 15; Act of March 3, 1873. The Government began to pay interest on the fund from June 12, 1873, and, since the act was specific in directing that interest be paid from the time of certification, we presume that June 12 was the date of certification.

The plaintiff further claims that the Government erroneously deducted $175,000 from the interest-bearing fund in

its first computation of interest. It did so because section 4 of the Act of February 14, 1873, quoted in finding 15, had, before the principal fund here involved had been appropriated to the Cherokees, appropriated $175,000 out of that fund for specific uses for the Cherokees which would remove that amount from their interest-bearing fund. The Government had in fact deducted $100,000 of this amount when it first computed the interest on the fund in June, 1873, and later retroactively deducted the other $75,000 as of the beginning, i. e., June 12, 1873. The plaintiff claims that the $175,000 was not actually withdrawn from the Treasury until considerably later, $80,000 of it on October 4, 1873 and $95,000 on April 25, 1874, and that therefore it should have been credited with interest on the basis of the amounts that were actually in the Treasury until those dates. The full sum was certified to the Secretary of the Treasury on June 12. We think the plaintiff was entitled, under the Act of March 3, 1873, to interest from June 12, 1873, the date of certification, until the dates when the amounts referred to were actually withdrawn from the principal fund.

The Government contends that the claim above discussed as to the interest on the $175,000 was not pleaded in the plaintiff's petitions. We think this is true, in a strict sense, but that it is so closely related to the claims that were made in the petition in No. L-46 that the Government has not been put to any disadvantage in its accounting by the lack of more specific pleading. We have been able to work out from the evidence an accounting of the matters involved in this claim which, we think, is complete, hence we decide it on its merits.

The plaintiff claims that the $200,000 appropriated by Congress out of the principal fund here involved by section 13 of the Act of March 3, 1875 (see finding 15), should have remained on interest until it was actually withdrawn from the fund on May 15, 1875. The Government stopped the interest on it on March 3, the date of the appropriation. We think the plaintiff should have been credited with interest until May 15, for the reasons given above in connection with the $175,000 withdrawal.

The amount to which the plaintiff is entitled as a result of our decision on these items is $7,374.30.

VII.

The plaintiff's claims based upon the facts shown in our finding 17 are not, in our opinion, valid. They seem to be based upon an assumption that the Government is liable, to the beneficiary of an appropriation, for interest on the sum appropriated from the date of the appropriation to the date when the money is expended for or turned over to the beneficiary. This assumption is, of course, not correct. The Government is not liable for interest unless it has promised to pay it, or it is granted as a measure of just compensation for a past taking of property. Here the appropriation acts did not provide for interest. If the plaintiff has some notion that the Cherokee funds appropriated by the Acts of 1880, 1888, 1889, and 1893, referred to in finding 17, had been bearing interest before they were appropriated, it does not establish that fact by telling us what funds the money was in, or what interest it was earning before it was appropriated. The appropriation of $1,660,000 by the Act of March 2, 1895, was in discharge of the Government's interest bearing debt of that amount, and interest was paid on it until March 4, 1895, the date on which it was set up on the books of the United States as available for the purposes for which it was appropriated. Discussion of this problem occurs under heading VIII in this opinion.

VIII.

As shown in finding 18, the United States, by an agreement made with the Cherokees in 1891 and ratified by Congress in 1893, purchased from them a large tract of land in Oklahoma known as the Cherokee Outlet. The ratifying act appropriated $295,736 for the purchase and authorized the Secretary of the Interior to contract to pay $8,300,000 in addition. It provided that the latter sum should be payable in five equal annual installments the first to be due on March 4, 1895 and the last on March 4, 1899, "said deferred payments to bear interest at the rate of four per centum per annum, to be paid annually, and the amount required for the payment of interest as aforesaid is hereby appropriated."

The Act of March 2, 1895 appropriated $1,660,000 for the payment of the first of the five installments, due March 4, 1895 and said:

> *Provided*, That said sum shall be held subject to the payment of the Delaware and Shawnee Indians and the Cherokee Freedmen as provided by the tenth section of said Act [March 3, 1893] to be available immediately after March fourth, eighteen hundred and ninety-five.

On March 4, 1895, the $1,660,000 was deposited in the Treasury to the credit of the Cherokees, and interest was stopped on that date. It was paid out as rights to it were established, the first payment on April 9, 1895 and the last on May 9, 1921. Ninety-eight per cent of it was paid out in the first five years.

The plaintiff claims interest at 4% on undisbursed balances of this amount as those balances stood after each disbursement from 1895 to 1921. The Government contests the claim because not pleaded and also on its merits. The claim was not pleaded with particularity. However, all the relevant facts seem to be in evidence and we decide the claim on the merits. Congress provided in the Act of March 3, 1893, for interest on each deferred installment until it was due, and it set the date of March 4, 1895, as the due date for the first installment. It also recognized that the Delawares, Shawnees, and Freedmen had, or might be held to have interests in the land which the Government was purchasing from the Cherokees, and provided that they should receive their pro rata share of the pay. When March 4, 1895, the due date for the first installment was at hand, it appropriated the money to pay it, but provided that this money should go, so far as needed, to the three classes of owners other than the Cherokees, which classes had, apparently by that time been determined to be entitled to approximately one-fifth of the purchase price. The other four-fifths of the purchase price still bore interest, since it consisted of annual installments not yet due, but expressly carrying interest. A promise to pay interest, at the rate agreed to be paid upon the first installment before it was due, after it was due and had been made available to those who were to receive it as soon

as they showed their right to it, can not be spelled out of these statutes. The Cherokees did not own the right to this money after March 4, 1895, except as to some undetermined amount which might remain after the Delawares, Shawnees and Freedmen had been paid. It would have been impossible to compute interest on such an unascertained and unascertainable amount, and there was, so far as appears, no intent to do so.

IX.

Certain items of expenditure, listed in finding 19, and totaling $2,181.21, are claimed as improper by the plaintiff. These sums were spent in connection with the distribution to the Shawnees and the Cherokee Freedmen, of their proportionate part of the price paid by the United States for the purchase of the Cherokee Outlet. See finding 18, and the discussion in this opinion under heading VIII., *supra*. The expense of distributing these per capita payments was not properly payable from the fund distributed. The balance of that fund, after the persons other than the Cherokees had been paid, belonged to the Cherokees. Hence the charging of these expenses to the fund amounted to charging them to the Cherokees. They should recover $2,181.21 on this claim.

X.

On the basis of the facts found in finding 20, the plaintiff is entitled, as the Government concedes, to $3,142, with interest at 5 percent from June 30, 1923, to the date of judgment herein. The total amount due, including interest, under this heading, is $6,523.11.

XI.

We have found in finding 21 that the Government charged various Cherokee funds, on various dates, all but five of which were between September 30, 1862, and March 31, 1866, with various disbursements. We are not given the details concerning these charges, and must determine them on the basis of whether they appear, *prima facie*, to be proper or improper. Two charges for taxes on salaries, of $2.40

and $47.75, appear to be improper. Likewise, charges totaling $1,039.46 for salaries of agents, expenses of operating agencies and board for agents, are not proper charges. Some of the other charges such as that for seeds for other tribes, and that for blankets for Creeks and Seminoles would appear to be improper except for the fact that they were made during the war period when Congress had authorized the use of funds for the relief of loyal Indians, not necessarily of the tribe whose funds were used. We have discussed this problem under heading II, above.

The Government should account for $1,089.61, on the claim shown in finding 21, with interest at 4 percent from the dates of disbursement to the date of judgment herein. The total amount due, including interest, under this heading, is $4,605.61.

We have computed the interest on these items, and those allowed under heading XII of this opinion, at 4 percent. The disbursements were from trust funds, but the plaintiff has not shown which trust funds they were from. We therefore compute interest at the lowest rate which any of the funds bore.

XII.

In our finding 22 appear two lists of disbursements made by the United States from interest due on Cherokee trust funds, which disbursements the plaintiff claims were illegal. All of the disbursements shown in the first list appear to be illegal except the first item, the fifth from the last, and the last three. The others are Indian Agency expenses which should not have been charged against the Indians' funds. The first item, "Traveling expenses of Creeks and Seminoles," may well have been a disbursement made in caring for loyal refugee Indians, and therefore proper, as we have said under heading II, above. Since the claims shown in finding 22 were not pleaded with particularity in the plaintiff's petitions, we will not presume that expenditures listed there were illegal, when they may have been legal, and the Government's accountants were not put on notice by the petitions that any claim was based upon them.

The second list in finding 22 relates principally to disburse-

ments for relief of refugee Indians during the war period. These items were not pleaded in the petitions. They may well have been disbursements for loyal members of the tribes named, and we will not presume that they were illegal. The three items of "Pay of Miscellaneous employees" were expended for education, and were properly made from Indian funds.

The plaintiff is entitled to $1,111.77 with interest at 4 percent from the dates of disbursement to the date of judgment herein, on the items in the first list in finding 22, except the first, the fifth from the last, and the last three items. The total amount due, including interest, under this heading, is $4,556.49.

XIII.

In finding 23 we have listed a number of items which we have taken from the records which are in evidence and which correspond, for the most part, with claims asserted by the plaintiff in its proposed findings of fact. These claims are not pleaded in the petitions, hence, as we have said above, we will not presume that the disbursements were illegal, since the defendant had no reason to explain them in its accounting. Some of these items are obviously proper charges against Cherokee funds, and the others may have been proper. We therefore allow nothing on the items in finding 23.

XIV.

In finding 24 we have shown certain apparently unexpended balances from appropriations made for the Cherokees by appropriation acts recited in the findings. We have also shown certain sums returned to the Treasury as surplus, under these acts. These claims were not pleaded in the petitions, and hence no explanation of them is attempted in the Government's accounting. We cannot, therefore, determine their validity, and the plaintiff cannot recover upon them.

XV.

In our discussion under heading IV., we postponed consideration of the effect of the Slade and Blender Report and the

litigation following it. The relevant facts are recited in finding 12. It there appears that this court and the Supreme Court of the United States did not consider and adjudicate the merits of any of the claims involved in these suits. An examination of the reports of this court and the Supreme Court shows that two of the three members of this court who concurred in the judgment did not consider the merits even of the items which made up the balance which Slade and Bender found to be owing by the United States to the Cherokees. They held that the account, in the circumstances, was binding, regardless of its merits. 40 C. Cls. 252, 322–325, 328. Judge Peelle concurred in the judgment on the ground that the United States was indebted, on the merits, to the Cherokees in the amounts stated in the Slade and Bender Report. *Id.* at 339. The Supreme Court of the United States affirmed the judgment of this court, on both grounds (202 U. S. 101).

Items not involved in the Slade and Bender accounting and, indeed, items which they may have considered and rejected on their merits, as they viewed them, were not sued for by the Cherokees in the suit referred to above. They were not adjudicated "on their merits" within the meaning which Congress must have intended to give this phrase in the jurisdictional act under which these suits were brought. We have, therefore, not regarded them as excluded from our consideration by the litigation which followed the Slade and Bender Report.

The United States is indebted to the plaintiff in the amount of $25,240.72 which is the sum of the amounts shown under headings VI, IX, X, XI, and XII of this opinion.

OFFSETS

By the Act of August 12, 1935, c. 508, § 2, 49 Stat. 571, 596, 25 U. S. C. 475a, the United States is given the right to have set off against any amount found due to an Indian Tribe "all sums expended gratuitously by the United States for the benefit of the said tribe or band". In this case the report of the General Accounting Office under the 1935 Act, filed in this court September 22, 1937, shows that the United States has made gratuitous expenditures of various sums for

the Cherokees. On page 53 of that report it is shown that, out of an appropriation of $400,000 made by the Act of April 22, 1932, 47 Stat. 107, for aid to the common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations, and in the Quapaw Agency in Oklahoma, to be expended in the discretion of the Secretary of the Interior, $142,066.22 was spent during the fiscal year 1933 for "Aid of common schools" for the Cherokees.

We set off $25,240.72 of this expenditure of $142,066.22, gratuitously made for the benefit of the Cherokees, against the $25,240.72 which, we have held above, the United States owes the Cherokees. The liability being thus cancelled by the offset, the plaintiff cannot recover. For purposes of possible future accounting, there will remain, of the $142,066.22, after deducting the $25,240.72 used as an offset in this case, only $116,825.50.

The plaintiff's petitions will be dismissed. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

STANDARD ACCIDENT INSURANCE COMPANY v. THE UNITED STATES

[No. 43808. Decided January 8, 1945]*

On the Proofs

Government contract; surety on contractor's performance bond has right to sue for excess costs where surety completes contract upon termination for failure to proceed.—Where the contract was terminated by the Government for contractor's failure to proceed with due diligence; and where, by agreement, the surety took over the performance of the contract and was substituted as the prime contractor, subject to the obligations of the contract and entitled to all rights and benefits accruing under it; it is *held* that plaintiff, surety, is entitled to bring suit for excess costs incurred, if any. *Fidelity and Casualty Co. v. United States*, 81 C. Cls 495.

*Plaintiff's petition for writ of certiorari pending.

Same; immaterial whether work is completed by subcontract with original contractor or another.—Where surety, by agreement, took over a Government contract which had been terminated by the Government because of contractor's failure to proceed with due diligence; and where excess costs were incurred by plaintiff, surety; it is immaterial whether plaintiff employed the original contractor, or another, to complete the work.

Same; no recovery where extra work was done by contractor without protest to contracting officer who was empowered to decide all questions of fact.—Where plaintiff incurred extra costs in carrying out orders of the superintendent of construction without protest to the contracting officer, who under the provisions of the contract (Article 15) was empowered to decide all questions of fact arising under the contract; plaintiff is not entitled to recover. (Findings 7 and 10).

Same; no recovery for extra work performed without written order of contracting officer.—Where plaintiff, in compliance with orders of the superintendent of construction, incurred extra costs for extra work, without securing from the contracting officer orders in writing as required by the provisions of the contract (Article 5); plaintiff is not entitled to recover. (Findings 9, 15, 17).

Same; purpose of Article 5 of construction contract to protect Government.—The purpose of Article 5 of the standard Government construction contract, requiring an order in writing from the contracting officer for extra work, is to protect the Government against the extra cost of extra work ordered by a subordinate.

Same; decision of contracting officer final in absence of appeal as required by contract.—Where contractor protested to the contracting officer as to work required by the superintendent of construction, and, asked for an order in writing on the ground that the work was an extra; and where the contracting officer ruled that the contract required the work to be done; the decision of the contracting officer was final under the provisions of the contract (Article 15) in the absence of an appeal to the head of the department. (Finding 11).

Same; where defendant breaches the contract recovery allowed only for actual damages suffered and not for profit.—Where damage to plastering was clearly the fault of the defendant in failing to furnish the temporary heat which it had agreed to furnish under the provisions of the contract, plaintiff is entitled to recover only the damage actually suffered, which was the actual cost of repairing or replacing the plaster, including overhead, but is not entitled to recover profit. (Finding 13, 14).

Same; no recovery allowed for damages due to delay of another contractor.—Plaintiff is not entitled to recover from the defendant for damages for delays caused by failure of another

contractor to perform its contract promptly, where the delay did not involve any fault on the part of the defendant. (Finding 18).

Same; no recovery where proof does not show amount of delay for which defendant was responsible nor damages caused thereby.—Where it is shown that there was a delay to the plaintiff for a part of which the defendant was responsible after it took over the completion of the work of another contractor whose contract had been terminated by the defendant for delay; there can be no recovery where the proof does not show the amount of the delay for which defendant was responsible nor the damages caused thereby. (Finding 18).

The Reporter's statement of the case:

Mr. Norman B. Frost for plaintiff. *Mr. George M. Weichelt* was on the brief.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Standard Accident Insurance Company, is a corporation organized and existing under the laws of the State of Michigan.

2. On January 8, 1932, the plaintiff obligated itself by bond as surety for the performance by Joseph A. Holpuch Company of the terms of a contract between the Joseph A. Holpuch Co. and the United States, No. VAc 110, entered into December 30, 1931, the United States being represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, whereby, for the consideration of $788,600.00, the Holpuch Company agreed to furnish all labor and materials and perform all work required for constructing and finishing complete at the Veterans' Administration Home, Leavenworth, Kansas, a Hospital Building and tunnel and Nurses' Quarters, including roads, retaining wall, walks, grading and drainage in connection with these buildings, and removing and relocating the existing Governor's residence and Quartermaster's residence, providing the roads, walks, grading and drainage in connection with the two relocated buildings, but not including plumbing, heating, electrical work, outside service connections, electric elevators and refrigeration plant in connection with the

Hospital Building and Nurses' Quarters, all according to designated specifications, schedules and drawings made a part of the contract.

The work was by the contract agreed to be commenced within 15 calender days after date of receipt of notice to proceed and was to be completed within 300 calendar days thereafter.

Notice to proceed was received by the Holpuch Company January 18, 1932. The work accordingly was to be commenced by February 2, 1932, and was to be completed by November 13, 1932.

3. Articles 3, 5, 6, 9 and 15 of the contract read in part as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.
>
> ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.
>
> ARTICLE 6. * * * The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such material, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning

questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

4. The Holpuch Company began work on the contract within the agreed time. On April 1, 1932, the contracting officer terminated the Holpuch Company's right to proceed with the work, on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time.

5. The Holpuch Company endeavored to get the order of termination vacated and its contract reinstated. For that purpose its representative, together with a representative of the plaintiff, visited the contracting officer in Washington, D. C., and presented the Holpuch Company's request to that officer. The contracting officer refused to set aside the order of termination.

A large proportion of the work had already been let by the Holpuch Company to subcontractors. In view of that fact, and that the cancellation of the subcontracts would probably result in delays, litigation and increased cost of performance, it was arranged among the interested parties that the plaintiff should undertake performance of the remaining work under the terms of the original contract, that the plaintiff should sublet such work to the Holpuch Company, thus keeping the subcontract structure more or less intact, that the contract price should be paid by the surety (plaintiff) to the Holpuch Company, and that the management of the work should be placed in the hands of Mads Madsen, who operated under the name of Mads Madsen & Company, and who was Holpuch Company's subcontractor on concrete and cement work.

By contract between the plaintiff and the Holpuch Company dated April 25, 1932, the Holpuch Company agreed, as plaintiff's subcontractor, to perform all the work originally agreed to be performed, including changes, past and future, but not including work already performed, all at the original

contract price as amended by defendant's changes, the Holpuch Company to receive directly a proportionate amount for the work already done.

The management of the work was placed in the hands of Mads Madsen by contract to that effect between the Holpuch Company and Mads Madsen April 12, 1932.

No formal contract, other than the original contract with the Holpuch Company and the bond of the plaintiff for performance, was signed by the contracting officer.

6. The plaintiff proceeded with the work the latter part of April 1932, under the arrangement thus made, and it was substantially completed June 30, 1933, being 229 days beyond the original contract time.

Thereafter the plaintiff was paid the full contract price, including prices on change orders, and plaintiff turned such receipts over to the Holpuch Company, except that the sum of $5,130, part of the contract price, was paid by the defendant directly to the Holpuch Company for work done prior to termination of its contract as heretofore related.

7. *Barrel bolts on window screens*, $387.20. Barrel bolts on the window screens were supplied by the plaintiff according to samples submitted and accepted. Their installation as shown on the contract drawings placed them in an inoperative position. The plaintiff's and defendant's superintendents and the contractor having their installation conferred on the difficulty and decided to place the bolts in a different position.

The bolts were for the purpose of preventing the screens from warping outwardly in the center.

They were installed as agreed, but with a certain lack of uniformity. On final inspection by the Government's officers, some of the installations were objected to and the plaintiff was required to change them to conform to the ideas of defendant's superintendent of construction, and the plaintiff made the change.

The reinstallation required made a more workmanlike job.

The cost to the plaintiff of the change amounted to $387.20 including overhead and profit.

Claim therefor, in the sum of $387.20, was made by plain-

tiff to the Comptroller General November 16, 1934, and it has not been paid.

8. *Changes in installation of marble*, $173.03. The plaintiff waives this item of its claim.

9. *Access panels*, $535.43. Section 18 C 6 (a) of the contract specifications provided that: "Where shown or directed in hollow tile partitions or in ceiling or wall furring for access to concealed traps, valves, machinery, etc., there shall be provided doors of No. 16 U. S. Standard gauge sheet steel." This provision was under the heading "Standard Specification for Fire Resisting Doors, etc."

The plans showed the location of numerous access panels. Such panels are designed to give access to concealed traps, valves, pipes, machinery, electrical work, etc.

The plaintiff installed 61 more access panels than were shown on the plans.

While the plaintiff was installing access panels shown by the plans, defendant's superintendent of construction examined the situation and ruled that plaintiff must install these additional access panels under the drinking fountains and other places of installation not shown by the plans. The plaintiff proceeded to do so and installed 61 of them. Defendant's construction superintendent submitted his ruling to the Veterans' Administration in Washington, D. C., which ruled that they were not to be installed. Their installation has not been paid for. The cost thereof, including profit and overhead, was $535.43.

Following correspondence on the subject the plaintiff's general superintendent, Mads Madsen, made claim September 30, 1933, addressed to the Director of Construction, Veterans' Administration, for this amount.

Prior thereto, beginning the early part of February 1933, the plaintiff, in correspondence with the contracting officer through his local superintendent of construction, had asserted claims for the cost of the additional access panels. The accepted practice in force was for plaintiff's representative to communicate with the contracting officer by routing his letters thereto through the local superintendent of construction.

10. *Membrane waterproofing*, $332.75. Article 5 (a) of section 14 C of the specifications is as follows: "Where promenade tile roofs are required, the membrane waterproofing shall cover the entire area below the concrete and tile topping, except as otherwise specified under 'Roofing'."

There were two corridors connecting buildings under construction which were open to the weather at the sides. Contract drawing No. 202 showed that the floors of these exposed corridors were to be provided with membrane waterproofing.

A dispute arose between the parties as to whether the contract required this membrane to be laid in the exposed corridors. The contracting officer ruled that it was to be laid and it was laid.

Article No. 2 of the contract provided that: "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both."

The plaintiff did the work under protest, submitted a bill to the Veterans' Administration December 27, 1932, for the actual cost, plus profit and overhead, a total of $332.75, and it has not been paid.

11. *Wood terrazzo grounds*, $3,993.00. The specifications, section 12 CC (6), with reference to terrazzo base, provided: "Base shall be run plumb, level, true and straight with neatly formed cove and rounded top. When sufficiently hardened, rub surface with an electric base rubbing machine or by hand in places where machine cannot reach, using a coarse abrasive for first rubbing after which a coating of neat portland cement of approved color shall be applied, well rubbed into surface holes, interstices and voids. The finishing of base, borders and thresholds shall consist of polishing all plain and curved surfaces with a fine stone to level, plumb, true and smooth finish."

Section 22 C (11) of the specifications provided: "Where required, terrazzo base as provided under 'Terrazzo' (Section 12 CC) shall be installed before plastering. Plastering shall always begin at top of base or bottom of partition in order to insure a straight, true wall."

In order to run plumb, level, true and in a straight line the terrazzo base required temporary wood grounds, which acted as a guide for the mold when the terrazzo base was being laid. After the terrazzo base had been constructed, the temporary grounds were removed and scrapped and the plastering begun from the base upward as required by Section 22 C (11) of the specifications.

Temporary wood grounds were considered necessary in good practice and were necessary to do a workmanlike job, but no mention was made of them in the specifications.

In subletting the work the prime contractor made no provision for the temporary grounds, and a dispute arose on the job as to what subcontractor was obligated to erect the temporary grounds. The defendants' officers were not a party to the dispute, and confined their ruling to a decision that temporary grounds must be used, and they were used under protest made to the Veterans' Administration.

The Veterans' Administration, in reply to the plaintiff's protest, wrote the plaintiff November 4, 1932, that the matter of setting temporary grounds was one to be settled between the plaintiff and its subcontractors, and not for the Veterans' Administration to decide.

There was some delay in laying the terrazzo base. In order to hasten the work of the plasterer the defendant's superintendent of construction on the job ordered plastering to proceed notwithstanding the base had not all been laid. To do this temporary wood grounds were necessary for the line between plaster and rounded top of the terrazzo base. On October 10, 1932, the superintendent gave the plaintiff the following order:

> You will proceed to set plaster grounds as called for in Section 24 C, Page 4, Item 19 of the Specifications.
> This will be done in order to enable the plasterers to work. The job has been delayed at least one week due to the controversy over the setting of these grounds.

Section 24 C (19) of the specifications provided, under the general heading of "Carpentry:"

> Wood grounds shall be provided where shown or required for plastering, for securing all wood trim or other finished woodwork and for securing the work of all trades.

Plastering before the terrazzo base has been installed is bad practice and not commonly done, due to probable injury and discoloration. In good practice the terrazzo base is set before plaster and floor, and gives a ground both for the plaster and the floor level to work to. Where plastering precedes the laying of the terrazzo base, the rubbing of the terrazzo to smooth it down is likely to injure the plaster.

The cost of installing the temporary wood grounds was $2,994.75 and that of removing them was $998.25, a total of $3,993.00, inclusive of overhead and profit. This cost has not been reimbursed the plaintiff.

12. *Sash lifts*, $467.16. The plaintiff withdraws its claim for cost of additional sash lifts.

13. *Repair of plaster cracks*, $497.23. Under the heading of "General Conditions" in the specifications there appears Section No. 34, "*Temporary Heat*," as follows:

> The contractor shall furnish heat to prevent injury to work or material through dampness or cold. At all times when there is concrete not thoroughly set, and after starting to apply the first coat of plastering, he shall maintain a temperature of at least 40° F. For 10 days previous to the placing of the interior wood finish and during the time that varnish is being applied, a temperature of at least 70° F. shall be maintained in the building.
>
> The temporary heat may be obtained by connecting the radiators for the buildings to the present lines of the heating system at the station at such points as designated by the superintendent. All connections shall be made by the contractor at his own expense but the necessary steam for heat will be furnished by the Government, at no expense to the contractor.
>
> The use of salamanders or other types of heating which may smoke and damage the finished walls, etc., will not be allowed.

The heat for the project came from a power plant maintained by the Government on the premises. This plant was not of sufficient capacity to maintain heat in the Veterans' Home and in the buildings under construction at the same time during extremely cold weather. While plastering was being done in the new buildings the heat therein was suddenly shut off in freezing weather, for humanitarian reasons,

to give the existing Veterans' Home adequate heat. The plaster applied and being applied was wet and in that condition froze. The freezing caused the plaster to disintegrate and the defendant's superintendent ordered it patched and replaced, and it was patched and replaced. After the damage was done, defendant's superintendent ordered plastering to be discontinued for the time being.

The plastering subcontractor protested against the extra work and was told by the defendant's superintendent to record the cost and submit its claim to the proper officials.

On December 28, 1932, the plaintiff communicated with the contracting officer by letter complaining of this situation and asking relief from damages caused by lack of heat.

May 26, 1933, following a previous proposal, the plaintiff submitted to the Veterans' Administration, a revised proposal for settlement of its claim for repairing the damage to plaster by reason of lack of heat in the amount of $497.23, which was the actual cost plus overhead and profit. This the contracting officer denied June 21, 1933, on the ground that the contract did not provide for payment of an item of this nature. The profit included amounted to $45.20.

14. *Brushing plaster*, $738.30. Due to the lack of heat, as stated in Finding No. 13 herein, considerable areas of the last coat of plaster, the white coat, disintegrated. Defendant's construction superintendent decided that these areas needed resurfacing and ordered the plaintiff to resurface.

The plaintiff did this, under protest, and at a cost of $738.30, including a profit of $67.11. January 13, 1933, and again May 26, 1933, the plaintiff claimed of the contracting officer extra compensation in the approximate amount here sued for, and it has not been paid.

15. *Extra furring*, $13,403.97. The specifications required all pipes to be covered, furred in and plastered.

Paragraph No. 11 (d) (e) of Section 2 C of the specifications under the heading of "Concrete Work and Materials" provided:

> (d) Build into the construction all wall ties, anchors, wood blocks, inserts for support of pipe hangers, etc., hangers for suspended ceilings, nailing strips, grounds, etc., required or as hereinafter specified.

(e) Also build in sleeves for pipe lines as furnished and located by contractor for Heating, Plumbing and Electric Work, etc. Wherever these sleeves or fixtures interfere with beams or girders, etc., the contractor shall provide special slag and beam construction as required to take care of these conditions.

Paragraph No. 2 of Section 22 C of the specifications under the heading of "Lathing and Plastering" provided:

Except in unfinished rooms, all vertical and horizontal pipes, ducts, etc., for plumbing and heating work not enclosed by masonry or wood furring, shall be concealed by steel furring, metal lath and plaster, unless otherwise shown or directed. Where suspended ceilings are indicated for basements, all heating and water mains shall run exposed under the ceilings.

Under the heading of "General Conditions for Heating" the specifications, paragraph No. 2 of Section 1 H provided:

Risers shall be run generally concealed in furring or partitions unless indicated otherwise.

Runouts from risers to radiators on upper floors shall be run concealed in furred ceiling below slab unless indicated otherwise.

There were about 500 discrepancies between the mechanical and the architectural drawings, and this number was unusual. A great many horizontal and vertical pipes had to be run in places not shown by the drawings, and the location of their installation was determined by defendant's superintendent of construction from time to time as the work progressed. Pipes had to be run so as to avoid structural members and this often entailed furring not disclosed by the drawings.

Furring shown in the drawings for pipes in the Nurses' Home was not shown in the drawings for corresponding pipes in the other buildings.

The plaintiff furred in all pipes as directed by the defendant's superintendent of construction. The cost of doing so on furring not shown by the drawings amounted to $13,403.97, inclusive of overhead and profit, and it has not been reimbursed to the plaintiff.

16. *Re-laying linoleum*, $204.19. This claim has been abandoned by the plaintiff.

17. *Adjusting windows*, $613.77. In fitting the window sash into their frames the plaintiff allowed the customary clearance in order that the sash might be moved freely up and down. Thereafter, while plastering was in progress and by reasons thereof moist conditions prevailed in the buildings and the sash swelled and became too tight for operation. In this situation the defendant's superintendent of construction ordered the plaintiff to reduce the width of the sash by shaving or planing, to which the plaintiff objected, on the ground that when the sash became dry again they would be too loose.

The superintendent insisted on their alteration and plaintiff, under protest, made the change. Upon final inspection the sash had become dry, and rattled in their frames. Defendant's officers ordered maple strips to be tacked to the side of the sash to bring the sash back to their proper original width. This was done by the plaintiff at a cost of $613.77, including overhead and profit. The plaintiff filed a claim for this amount with the Comptroller General November 16, 1934, and it has not been paid.

18. *Damages for delay*. Simultaneously with contract No. VAc 110 the defendant entered into a contract December 30, 1931, with the P. H. Meyer Company, of Louisville, Kentucky, covering work by the mechanical trades, such as plumbing, heating, electrical work, outside service connections.

The Meyer contract provided that work should "be commenced promptly after date of receipt of notice to proceed" and "be completed at a date not later than that provided in the contract for General Construction."

The Meyer Company was lacking in diligence in the doing of the work under its contract, as a result of which plaintiff was delayed. The defendant on March 31, 1933, terminated the Meyer Company's right to proceed, and itself took over the doing of the work required by the Meyer contract. After defendant took over this work plaintiff was further delayed by the plumbing, heating and electrical work.

The amount of the delay caused by the Meyer Company and the amount caused by the defendant is not shown, nor

does the proof show the damage resulting from the delay by the Meyer Company and by the defendant.

19. The final payment made to the plaintiff on the contract through certification of the General Accounting Office was on or about the latter part of August 1937. By this certification liquidated damages for delay theretofore assessed were remitted and plaintiff was relieved altogether from payment of such damages.

Plaintiff's final voucher against the defendant for the balance of the contract price contained the following indorsement:

> I certify that the above bill is correct and just and that payment therefor has not been received, but this payment is not to be considered final settlement of our contract, and is accepted under protest since certain claims and amounts (as per attached statement) have not been included in this voucher. Standard Accident Insurance Co.

The claims and amounts referred to were as follows (the serial numbers and captions of the findings herein being used for convenient reference):

Finding:

7. *Barrel bolts on window screens*, $387.20.
9. *Access panels*, $535.43.
10. *Membrane waterproofing*, $332.75.
11. *Wood terrazzo grounds*, $3,993.00.
13. *Repair of plaster cracks*, $497.23.
14. *Brushing plaster*, $738.30.
15. *Extra furring*, $13,403.97.
17. *Adjusting windows*, $613.77.
18. (b) *Installing screens*, $968.00.
    (c) *Carpentry and insurance*, $4,203.15.
    (d) *Lathing and plastering*, $16,170.78.
    (f) *Field overhead*, $11,898.02.
    (g) *Temporary radiators*, $3,388.00.
    (i) *Progress photographs*, $166.62.
    (j) *Additional travel*, $3,902.25.
    (k) *General overhead*, $14,141.45.

The last two items are combined as one item, together with another for cost of engineers' reports, now withdrawn by the plaintiff. There are other items in plaintiff's reservation

to the final settlement either withdrawn or not involved herein.

20. There is no evidence of appeal to the head of the Veterans' Administration on any item of claim made herein.

None of the work involved herein was covered by an order in writing for changes or an order for extra work.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff was the surety on the performance bond of the Joseph A. Holpuch Company, which had a contract for the erection of a hospital building and nurses' quarters at the Veterans' Administration Home at Leavenworth, Kansas.

On April 1, 1932, the Holpuch Company's contract was terminated, due to, according to the findings of the contracting officer, its failure to proceed with such diligence as would insure completion of the contract by the agreed date. Thereafter, plaintiff and the Veterans' Administration entered into an arrangement, under which plaintiff agreed to take over performance of the contract and sublet it to Joseph A. Holpuch Company. Pursuant to this agreement, plaintiff and the Holpuch Company entered into a contract on April 25, 1932, whereby the Holpuch Company agreed, as the plaintiff's subcontractor, to perform all work required by the contract. Thereafter, all payments due from the defendant were made to the plaintiff and the plaintiff in turn transmitted them to the Holpuch Company.

In this suit plaintiff sues for certain excess costs incurred for work done which it alleges was not required by the contract, and it also sues for damages for delays caused by an independent contractor who had a contract with defendant for the installation of the plumbing and other mechanical work.

Defendant defends, first, on the ground that whatever excess costs may have been incurred and whatever damages may have been sustained were incurred and sustained by the Holpuch Company and not by plaintiff and, therefore, it says plaintiff cannot recover.

This is not a good defense. When the Holpuch Company's right to proceed was terminated, the surety company, by agreement, was substituted for it as the prime contractor, subject to the obligations of the contract and entitled to all rights and benefits accruing under it. *Fidelity & Casualty Co.* v. *United States*, 81 C. Cls. 495. If excess costs were incurred, they were incurred by plaintiff, so far as the defendant is concerned. This is clearly true in a case where the surety employs another contractor to complete the work. That the same contractor was employed would seem to make no difference.

It may be that the surety undertook to require the Holpuch Company to bear these excess costs, but whether or not it did or whether or not it succeeded, the record does not show. But even if it did, this does not relieve the defendant from liability. Defendant has not paid whatever debt it owes. Its obligation has not been discharged. Whatever may have been paid by the Holpuch Company was not paid for the account of the United States.

The first item of plaintiff's claim is for the cost of changing certain barrel bolts on window screens. On final inspection by the Government's officers plaintiff was required to change them in order to make a more workmanlike job. Plaintiff did so, at a cost of $387.20. We do not need to decide, however, whether or not plaintiff's superintendent of construction was justified in requiring the change, because plaintiff made the change without protesting to the contracting officer against being required to do so. Article 6 of the contract gave the Government "the right to reject defective material and workmanship or require its correction." If plaintiff thought the job was not defective, it was required by article 15 of the contract to present the matter to the contracting officer for his decision. This article provides:

> * * * all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned. * * *

Plaintiff did not present the matter to the contracting officer and, therefore, is not in position to complain of the requirement of the superintendent of construction.

Plaintiff's next claim is for the cost of installing access panels not required by the plans and specifications. Plaintiff was required by the superintendent of construction to install 61 panels which were not required by the plans and specifications. This was extra work required of plaintiff, but plaintiff cannot recover therefor, in view of article 5 of the contract, which provides:

> * * * no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

This work was not ordered in writing by the contracting officer. On the contrary, when the superintendent of construction advised the contracting officer that he had ordered the installation of these 61 extra panels the contracting officer ruled that they were not to be installed.

The purpose of article 5 is to protect the Government against the cost of extra work ordered by a subordinate, but not approved by the contracting officer. Had plaintiff waited to secure the ruling of the contracting officer the additional access panels would not have been installed, and plaintiff would not have incurred the additional expense.

Plaintiff's next claim is for $332.75 for membrane waterproofing. The superintendent of construction ruled that this work was required by the plans and specifications. Plaintiff did the work without presenting the dispute to the contracting officer and, for the reasons stated above, cannot recover.

The next claim is for $3,993.00 for wood terrazzo grounds. These wood grounds were not called for in the specifications, but the superintendent of construction required plaintiff to use them because it was good practice to do so, and because they were necessary to do a workmanlike job.

Some justification for the ruling is to be found in section 24 C (19) of the specifications, under the general heading of "carpentry." This section reads:

> Wood grounds shall be provided where shown or required for plastering, for securing all wood trim or other finished woodwork and for securing the work of all trades. * * *

But the contractor protested to the contracting officer against this ruling of the superintendent of construction and asked for an order in writing on the ground that this was an extra. The contracting officer, however, ruled that the contract required the work to be done, but left to the plaintiff the settlement of the dispute as to which of its subcontractors would be required to do the work. This ruling of the contracting officer as to whether or not these wood grounds were required by the specifications, being a ruling on a question of fact, is final under article 15, *supra*, in the absence of appeal to the head of the department. No appeal was taken and plaintiff, therefore, is bound by the ruling.

Plaintiff's next claim is for the cost of repairing cracks in the plastering, in the amount of $497.23. Under the specifications the contractor was required to maintain in the building a minimum temperature of 40° F. while the plastering was going on. In order to obtain this temporary heat the contractor was permitted to connect the radiators for the buildings to the then existing heating system at the Veterans' Administration Home. It developed, however, that this heating plant was not sufficient to maintain heat in the Veterans' Home and also in the buildings under construction, and while the plastering was being done the defendant shut off the heat in the buildings under construction. As a result the wet plaster froze, causing it to disintegrate. Plaintiff was required to replace it or repair it, which it did, at a cost of $452.03. It presented claim to the contracting officer, but its claim was denied because the contracting officer said, "there is no provision under your contract for the payment of an item of the nature."

The damage to the plastering was clearly the fault of the defendant in failing to furnish the temporary heat which it had agreed to furnish and plaintiff is entitled to recover the damage resulting therefrom.

Plaintiff's claim is in the amount of $497.23, but this includes $41.09 for overhead, and $45.20 for profit. It is entitled to recover only the damage actually suffered, which was the actual cost of repairing or replacing the plaster;

it is not entitled to recover profit. Plaintiff is entitled to recover $452.03.

Plaintiff also claims $738.30 for brushing plaster made necessary by the failure of defendant to furnish the necessary heat. Plaintiff is entitled to recover this amount, less the amount included therein for profit, which is $67.11. Plaintiff is entitled to recover on this item the sum of $671.19.

Plaintiff's next claim is in the amount of $13,403.97 for extra furring. The specifications provide that all pipes, ducts, etc., for plumbing and heating work, except in unfinished rooms, should be enclosed by masonry or furring, unless indicated otherwise. It was found, however, that a great many horizontal and vertical pipes had to be run in places not shown by the drawings, due to discrepancies between the mechanical and architectural drawings, of which there were about 500. The location of the pipes was determined by the defendant's superintendent of construction as the work progressed. This required the contractor to do a great deal of furring not called for by the drawings. This was done by plaintiff at the direction of defendant's superintendent of construction. It was an extra made necessary by defendant's defective drawings, but plaintiff is barred from recovery therefor by article 5 of the contract, quoted above. Before doing this extra work plaintiff was required by the contract to obtain an order in writing. This it did not do.

Plaintiff's next claim is for adjusting windows, $613.77. In fitting the window sash into their frames plaintiff allowed the customary clearance in order that the sash might be moved freely up and down. Thereafter, on account of the moist conditions in the buildings due to plastering, the sash swelled and became too tight for operation. Defendant's superintendent required plaintiff, over its protest, to plane the window sash. After the plastering had dried the windows rattled and defendant's officers required plaintiff to tack maple strips to the windows to bring them back to their proper width. The cost of doing this was $613.77, including overhead and profit. This was extra work made necessary by the fault of the defendant's superintendent

of construction in ordering plaintiff to plane the windows in the first place. However, plaintiff is not entitled to recover therefor on account of its failure to secure from the contracting officer an order in writing for this extra work.

Plaintiff's last claim is for damages for delays caused by failure to do promptly the plumbing, heating, electrical work, etc. The P. H. Meyer Company, of Louisville, had an independent contract with defendant for the doing of this work, but its right to proceed under its contract was cancelled on March 31, 1933, and thereafter this work was performed by the defendant itself.

It is admitted the Meyer Company did delay plaintiff, but plaintiff cannot recover from this defendant therefor. It is clearly not entitled to recover from the defendant damages for delays caused by an independent contractor, and not involving any fault on the part of defendant. It was not the defendant that caused these delays; they were caused by a third party.

But the findings of fact of the Director of Construction of the Veterans' Administration, approved by the Assistant Administrator of the Veterans' Administration, show that after the defendant took over this work from the P. H. Meyer Company there was still some delay on the job. For such delay plaintiff is entitled to recover; but the proof does not show the amount of the delay nor the damages caused thereby. Plaintiff undertook to show its damage for the entire delay caused by the doing of the plumbing, electrical, etc., work, both the delay caused by Meyer Company and the delay caused by the defendant, but it does not separate the two. For failure of proof, no recovery can be allowed on this item.

It results that plaintiff is entitled to recover on the whole case the sum of $1,123.22. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

WHALEY, *Chief Justice*, dissents.

JONES, *Judge*, took no part in the decision of this case.

BENJAMIN SAYERS v. THE UNITED STATES

[No. 45557. Decided January 8, 1945]

On the Proofs

Pay and allowances; retirement after 30 years' service counting foreign service as double time; statute of limitation.—Where plaintiff enlisted in the United States Marine Corps in 1901 and served honorably until February, 1924, when at his own request he was transferred to the Fleet Marine Corps Reserve, in the grade of sergeant, pursuant to the provisions of the Act of August 29, 1916 (39 Stat. 589); and where plaintiff on February 1, 1931, was placed on the retired list as having completed 30 years' service, counting foreign duty as double time, and has since been paid retired allowances; and where it is established that plaintiff was eligible for retirement on July 4, 1928; it is *held* that suit for the allowances which he would have received for the period between July 4, 1928, and February 1, 1931, is barred by the statute of limitations, suit having been filed in 1941.

Same; correction of record under Act of June 25, 1938.—Where, by letter, in response in plaintiff's inquiry, the Commandant of the Marine Corps, on July 30, 1941, informed plaintiff that, counting foreign service as double time, he had completed 30 years' service on July 4, 1928; it is *held* that this did not constitute a correction of any error or omission in the service, rank or rating of the plaintiff within the meaning of Section 202 of the Act of June 25, 1938 (52 Stat. 1175).

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon a stipulation of the parties:

1. Plaintiff enlisted in the United States Marine Corps and served honorably through five terms of enlistment as follows: December 28, 1901, to December 30, 1905; January 23, 1906, to January 22, 1910; February 26, 1912, to February 25, 1916; February 26, 1916, to February 25, 1920; and February 26, 1920, to February 25, 1924. He was not discharged

from his last term of enlistment, but was, on February 26, 1924, at his request, transferred to the Fleet Marine Corps Reserve, in the grade of sergeant, pursuant to the provisions of the Act of August 29, 1916, 39 Stat. 589, 593.

Between April 26, 1902, and February 14, 1909, plaintiff served 5 years, 7 months, and 22 days on foreign shore stations on the Island of Guam, the Philippine Islands, and in China.

2. The plaintiff would have completed 30 years' actual service in the United States Marine Corps and the Fleet Marine Corps Reserve on February 25, 1934.

3. On January 6, 1931, the Secretary of the Navy approved an opinion of the Judge Advocate General of the Navy in which it was held that service for which double time is allowed by the War Department should be counted as double time in computing time for retirement of transferred members of the Marine Corps Reserve.

4. The Major General Commandant of the Marine Corps, by letter dated January 15, 1931, and approved by the Secretary of the Navy, informed the plaintiff that on February 1, 1931, he would be placed on the retired list of enlisted men of the Marine Corps. Since February 1, 1931, plaintiff has been paid retired allowances of $15.75 a month, but he has not been paid such allowances for any period prior to said date.

5. In response to plaintiff's written request of July 24, 1941, the Major General Commandant of the United States Marine Corps replied to plaintiff on July 30, 1941, as follows:

> In accordance with the request contained in reference (a),[1] you are informed that the records show that you completed thirty years' service in the Marine Corps, and Fleet Marine Corps Reserve, including foreign shore service which may be computed as double time for the purpose of retirement, on 4 July 1928.

6. If plaintiff's foreign shore service is authorized to be counted as double time for retirement he completed 30 years' service on July 4, 1928.

7. Had plaintiff been retired on July 4, 1928, the amount of retired allowances which he would have been entitled to

[1] Reference (a) was a letter from plaintiff dated July 24, 1941, which is not in evidence.

receive from that date to January 31, 1931, the date on which he was actually retired, is $486.67, as computed by the General Accounting Office.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, upon his completion of twenty years' actual service in the United States Marine Corps on February 25, 1924, was, at his request, transferred to the Fleet Marine Corps Reserve in the grade of sergeant. He would, on the basis of actual time spent in service, and in the Reserve, have been eligible for retirement, with the allowances for rations, clothing, quarters, fuel and light appertaining thereto, on February 25, 1934, when his time would have been 30 years. But on January 6, 1931, the Navy Department decided that Marines were entitled, as army men were, to have time spent by them in foreign service counted double, in computing the time at which they could retire with allowances. On January 15, 1931, the proper official advised the plaintiff that he would, on February 1, 1931, be placed on the retired list. This was done, and from that time forward the plaintiff has been paid the proper allowances.

Counting periods when the plaintiff had served in Guam, the Philippines, and China, as double time, the plaintiff had completed "thirty years" service on July 4, 1928, and he had, therefore, been eligible for retirement for some two and one-half years before he was transferred to the retired list. On July 24, 1941, that fact seems to have occurred to the plaintiff and he wrote to the proper authorities inquiring about it. He was advised on July 30 that the records so showed. He sues here for the allowances which he would have received during the period of two and one-half years, which would have amounted to a total of $486.67.

The defendant urges that the plaintiff's claim is barred by the statute of limitations, the period of which is six years. We think it is barred. The right to be transferred to the retired list and to receive the allowances accrued in July, 1928, and monthly thereafter until February 1931 when the pay-

ment of allowances began. To be sure, even the officials of the Marine Corps seem to have been unaware of the right of Marines to have their foreign service time counted as double, until January, 1931, when they so decided. But from that time the law was settled, and any person who had rights under the law could have learned what his rights were. Whatever rights the plaintiff had accrued in 1931 and before, so his petition in this suit, filed in 1941, was too late.

The plaintiff urges that he has a right under Section 202 of the Act of June 25, 1938, 52 Stat. 1175, to the benefit of a correction made by the Secretary of the Navy on July 30, 1941, when, in response to his inquiry, he was told that, counting foreign service as double time, he had completed 30 years of service on July 4, 1928. Section 202 of the 1938 Act includes this language:

> *Provided*, *further*, That the Secretary of the Navy, upon discovery of any error or omission in the service, rank, or rating for transfer or retirement, is authorized to correct the same and upon such correction the person so transferred or retired shall be entitled to pay and allowances, in accordance with his rank or rating and length of service as determined by the Secretary of the Navy.

We think that the letter from the Marine Corps of July 30, 1941, was not a correction of any error or omission contemplated by Section 202. It was nothing but a statement of the facts as they appeared, and had appeared in the records of the Marine Corps. The plaintiff's rights, therefore, cannot be predicated upon a corrected record, and be regarded as accruing at the time of the correction, since, in our view, there was no correction.

The plaintiff urges us to reconsider our holding in the case of *Timothy A. Dugan* v. *United States*, 100 C. Cls. 7, that in any event the beneficiary of a correction made under Section 202 could not recover allowances for a period before the date of his transfer to the retired list. In view of our conclusion that the plaintiff's claim is barred by the statute of limitations, we have no occasion here to reconsider the question decided in the *Dugan* case. Neither do we consider the Government's contention that the plaintiff agreed with it

to be bound by the decision in the *Dugan* case, and to move to dismiss this petition if the court's decision on that point in the *Dugan* case was adverse to the plaintiff's contention here.

The plaintiff's petition will be dismissed. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

JOSEPH A. HOLPUCH COMPANY v. THE UNITED STATES

[No. 43813. Decided January 8, 1945]*

On the Proofs

Government contract; corporation which had been dissolved in 1931 by court decree for failure to pay franchise taxes, upon payment of which decree of dissolution was vacated in 1936, entitled to sue in 1938.—Where the plaintiff, an Illinois corporation chartered in 1913, was dissolved by an Illinois court on June 8, 1931, and its charter and authority declared null and void, for failure to file statutory reports and State franchise taxes; and where, on February 29, 1936, the same court, upon a finding that plaintiff had filed all necessary reports due up to that date and had paid all franchise taxes and penalties thereon, entered a decree vacating its previous order or dissolution; it is *held* that the corporation which had been previously dissolved was by the later decree reinstated and reclothed with all its former powers as if the original decree had never been entered (*Ruthfield* v. *Louisville Fuel Company*, 312 Ill. App. 415, 38 N. E. 2d, 832) and plaintiff, at the time the instant suit was brought, January 12, 1938 had the capacity to sue.

Same; 1936 decree vacating the dissolution decree of 1931 intended to restore corporation to its previous situation.—In the instant case, the decree vacating the previous decree dissolving the plaintiff corporation was intended to put the corporation in the same situation it would have been in had it paid its franchise taxes when due.

Same; inequitable to collect State franchise taxes on corporation privileges and deny right to exercise these privileges.—It would be inequitable for the State of Illinois to collect taxes

*Plaintiff's petition for writ of certiorari pending.

levied on the privilege of doing business as a corporation and at the same time deny to the corporation the right to exercise that privilege.

Same; corporation empowered to sue upon contract entered into between date of decree dissolving the corporation and date of decree vacating its dissolution.—It was the purpose of the decree vacating the dissolution decree to give validity to all acts done in the meantime; and, hence, plaintiff is empowered to maintain an action for breach of a contract entered into between the date of the decree dissolving the corporation and the date of the decree vacating it.

Same; no recovery where no appeal was taken from decision of contracting officer on question of fact, as provided by the contract.—Where under the provisions (Article 15) of the construction contract between plaintiff and defendant, all disputes concerning questions of fact arising under the contract were to be decided by the contracting officer, whose decisions were final, subject to written appeal to the head of department; and where there was no written appeal from the contracting officer's finding that the plaintiff was not proceeding with due diligence, which was a question of fact; plaintiff is not entitled to recover for the alleged wrongful termination of the contract.

The Reporter's statement of the case:

Mr. Norman B. Frost for the plaintiff. *Mr. George M. Weichelt* was on the briefs.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Joseph A. Holpuch Company, named as plaintiff herein, was chartered as a corporation of the State of Illinois, January 17, 1913, to engage in the general building construction business.

On June 8, 1931, the Superior Court of the County of Cook, State of Illinois, by decree of that date declared the corporation dissolved and its charter and authority null and void for failure to file statutory reports and pay franchise taxes.

On February 29, 1936, the same court entered the following decree:

> This cause coming on this day to be heard upon the stipulation this day filed in the above-entitled cause by

the above-entitled parties, and the Court being fully advised in the premises, finds, that Joseph A. Holpuch Company has filed all necessary annual reports due up to the present time, and that it has paid all franchise taxes and penalties thereon.

Therefore, it is ordered, adjudged, and decreed that the decree entered in the above-styled cause on the 8th day of June, 1931, dissolving the said defendant corporation, be and the same is hereby vacated, set aside and held for naught.

* * * * *

2. On December 30, 1931, the plaintiff entered into a contract, No. VAc 110, with the defendant, represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, whereby, for the consideration of $788,600.00, the plaintiff agreed to furnish all labor and materials and perform all work required for constructing and finishing complete at the Veterans' Administration Home, Leavenworth, Kansas, a Hospital Building and tunnel and Nurses' Quarters, including roads, retaining wall, walks, grading and drainage in connection with these buildings, and removing and relocating the existing Governor's residence and Quartermaster's residence, providing the roads, walks, grading and drainage in connection with the two relocated buildings, but not including plumbing, heating, electrical work, outside service connections, electric elevators and refrigeration plant in connection with the Hospital Building and Nurses' Quarters, all according to designated specifications, schedules and drawings made a part of the contract.

By the contract it was agreed the work was to be commenced within 15 calendar days after date of receipt of notice to proceed, and was to be completed within 300 calendar days thereafter.

Notice to proceed was received by the plaintiff January 18, 1932. The work accordingly was to be commenced by February 2, 1932, and was to be completed by November 13, 1932.

3. The plaintiff began work on the contract within the agreed time. On April 1, 1932, the contracting officer terminated plaintiff's right to proceed with the work on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time.

Article 9 of the contract provided in part as follows:

> ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * *

4. The plaintiff endeavored to get the order of termination vacated and its contract reinstated. For that purpose its representative, together with a representative of plaintiff's surety on its performance bond, Standard Accident Insurance Company, visited the contracting officer in Washington, D. C., and presented plaintiff's request to that officer. The contracting officer refused to set aside the order of termination.

In view of the fact that a large proportion of the work had already been let by the plaintiff to subcontractors, and that the cancellation of the subcontracts would probably result in delays, litigation and increased cost of performance, it was arranged among the interested parties that the surety should undertake performance of the remaining work under the terms of the original contract, that the surety should sublet such work to the plaintiff, thus keeping the subcontract structure more or less intact, that the contract price should be paid by the surety to the plaintiff, and that the management of the work should be taken away from John V. Hawkins and placed in the hands of Mads Madsen, who operated under the name of Mads Madsen & Company, and who was plaintiff's subcontractor on concrete and cement work.

By contract between Standard Accident Insurance Co., plaintiff's surety, and the plaintiff, April 25, 1932, the plaintiff agreed, as the surety company's subcontractor, to perform all the work originally agreed to be performed, including changes, past and future, but not including work already performed, all at the original contract price as amended by defendant's changes, the Holpuch Company to receive direct a proportionate amount for the work already done.

The management of the work was placed in the hands of Mads Madsen by contract to that effect between plaintiff and Mads Madsen April 12, 1932.

No formal contract, other than the original contract with the plaintiff and the bond of the surety for performance, was signed by the contracting officer.

The defendant has paid directly to the plaintiff, for work performed by the plaintiff before termination of its contract, the sum of $5,130.00 as part of the contract price.

5. Article 15 of the contract reads as follows:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

No written appeal to the head of the department was taken by plaintiff from the finding of the contracting officer that the plaintiff was not proceeding with such diligence as to insure completion by the completion date.

6. No findings are made as to whether or not plaintiff was proceeding with the necessary diligence, nor on any damages that may have been suffered by plaintiff on account of the termination of the contract.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On December 30, 1931, an association known as the Joseph A. Holpuch Company entered into a contract with defendant to construct a hospital building and nurses' quarters at the Veterans' Administration Home at Leavenworth, Kansas. The work was to be commenced within 15 calendar days after receipt of notice to proceed and was to be completed within 300 calendar days thereafter. Notice to proceed was received by plaintiff on January 18, 1932, fixing the date

for commencing the work as February 2, 1932, and the date of completion as November 13, 1932.

On April 1, 1932, the contracting officer terminated plaintiff's right to proceed on the ground that it was not proceeding with sufficient diligence to insure completion within the agreed time. Plaintiff contends that this action was arbitrary, capricious, and unreasonable and, therefore, a breach of the contract. It sues for damages resulting therefrom.

The first defense raised by the defendant is that at the time the contract was entered into Joseph A. Holpuch Company, plaintiff, was not a corporation as it held itself out to be, and that it was not a corporation when this suit was brought on January 12, 1938.

On the trial of the case before the Commissioner the defendant introduced an order of the Superior Court of Illinois, dated June 8, 1931, dissolving the plaintiff company for failure to pay its franchise taxes. Defendant's counsel stated that this order was introduced for the sole purpose of reflecting on the credibility of the witness then under examination, Joseph A. Holpuch; but defendant now seeks to use it in support of its defense that plaintiff was not a corporation either at the time the contract was signed or at the time this suit was brought. Since plaintiff had no notice until after the closing of the testimony that defendant intended to use the decree of dissolution in support of its defense of *nul tiel* corporation, on plaintiff's motion we permitted it to file at the argument of this case a certified copy of a later decree of the Superior Court of Illinois, dated February 29, 1936, vacating the former decree of dissolution. This latter decree recited that it appearing—

> * * * that Joseph A. Holpuch Company has filed all necessary annual reports due up to the present time, and that it has paid all franchise taxes and penalties thereon.
>
> Therefore, it is ordered, adjudged and decreed that the decree entered in the above-entitled cause on the 8th day of June 1931, dissolving the said defendant corporation, be and the same is hereby vacated, set aside and held for naught.
>
> *   *   *   *   *

The corporation that had been previously dissolved was by this decree reinstated and reclothed with all its former powers as though the original decree of dissolution had never been entered. By its terms the dissolution decree was set aside and held for naught. The court's right to take this action is not questioned, *Ruthfield* v. *Louisville Fuel Company*, 312 Ill. App. 415, 38 N. E. 2d, 832, and so from this date on the situation was as if the dissolution decree had never been entered. The plaintiff, therefore, at the time this suit was brought had capacity to sue.

Whether or not it can maintain an action on a contract entered into between the date of the dissolution decree and of the decree setting it aside is not so clear. Except for the decree setting aside the decree of dissolution, we think the corporation could not have maintained an action on, or one for the breach of a contract entered into after its dissolution. *Bates Co.* v. *United States*, 77 C. Cls. 611, 618, 3 F. Supp. 245; *Zahn Co., et al.* v. *United States*, 79 C. Cls. 215, 220, 6 F. Supp. 317; *Chicago Title & Trust Co.* v. *Wilcox Building Corp.*, 302 U. S. 120, and cases there cited; *Berg Shipbuilding Co. et al.* v. *United States*, No. 45256, this day decided. [103 C. Cls.]. The authorities are in conflict over whether it can do so after entry of a decree vacating the decree of dissolution. The Court of Civil Appeals of Texas held in *Lyons* v. *Texorado Oil and Gas Company*, 91 S. W. (2d) 375, that after reinstatement a corporation could maintain an action on a contract entered into in the interim; and the Supreme Court of Oregon in *Gillen-Cole Co.* v. *Fox & Co.*, 146 Ore. 208, 29 P. (2d) 1019, held the same thing, where the contracts had been ratified after reinstatement. To the contrary is the opinion of the Supreme Court of California in *Ransome-Crummey Co.* v. *Superior Court*, 188 Calif. 393, 205 P. 446. Cf. *McClung et al.* v. *Hill et al.*, 96 F. (2d) 236.

However, under the facts disclosed in the case at bar, we are of opinion that the decree vacating the dissolution decree was intended to put the plaintiff corporation in the same situation as it would have been in had it paid its franchise taxes when due. This is because the decree vacating and setting aside and holding for naught the former decree was predicated on the fact that the taxes in default had been paid

and that penalties had been paid for failure to pay them when due. Had the taxes been paid when due, there would have been no basis for the entry of the dissolution decree. Their subsequent payment, together with the payment of penalties for non-payment when due, removed the reason for the dissolution and put the corporation in the same situation it would have been in had the taxes been paid when due. At any rate, we think this was what the court intended to accomplish when it entered the decree dissolving the dissolution decree.

It would be inequitable for the State to collect taxes levied on the privilege of doing business as a corporation and at the same time deny to the corporation the right to exercise the privilege. So when it accepted payment of taxes in default, together with penalties, and set aside the dissolution decree, we think it intended to validate the exercise of the corporate franchise in the years for which the taxes were paid.

Contracts entered into without the payment of license taxes are void only because the laws of the State imposing the taxes make them void, either expressly or by implication. We will not assume that the State of Illinois intended to accept taxes on the exercise of the corporate franchise and at the same time make the corporation's contracts illegal because it was not authorized to exercise the franchise.

If the effect of the decree setting aside the dissolution decree is what we have supposed, the defendant here cannot complain; its rights were in nowise prejudiced thereby. Only the State levying the taxes is interested in the non-enforcement of contracts entered into without prior payment of them. The other contracting party is not injured thereby. If defendant has breached its contract with plaintiff, certainly it should not escape liability therefor because the corporation did not pay its taxes when due, where the State, in consideration of the payment of penalties, has forgiven the corporation therefor.

We think it was the purpose of this decree vacating the dissolution decree to give validity to all acts done in the meantime and, hence, we conclude that plaintiff can main-

tain an action for the breach of a contract entered into between the dates of the two decrees.

The defendant also raises the defense that plaintiff cannot recover, whatever the merits, because it failed to pursue the procedure laid down by the contract for the adjustment of the dispute which arose between it and the contracting officer as to whether or not it was prosecuting the work with such diligence as would insure completion of the contract within the time required. We think this defense is good.

Article 9 of the contract provides in part:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * *

On April 1, 1932, the contracting officer wrote plaintiff in part as follows:

> This will confirm telegram of this date reading as follows:
>
> "Since you have failed to so prosecute the work under your contract dated December thirtieth nineteen hundred thirty-one for construction work Veterans Administration Home Leavenworth Kansas with such diligence as to insure its completion by the time stipulated therein you are notified that your right to proceed with the work is hereby terminated Stop This is done in accordance with article nine of the contract" * * *.

Thus the contracting officer found that the plaintiff was not prosecuting the work under its contract with such diligence as to insure its completion by the stipulated date. This is final under article 15 of the contract, in the absence of appeal. This article provides:

> * * * all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject

to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. * * *

Whether or not the plaintiff was proceeding with the requisite diligence was clearly a question of fact, made conclusive upon the parties, subject only to appeal to the head of the department.

When the plaintiff received the letter of the contracting officer it did not file a written appeal to the head of the department. Instead, its representative, together with the representative of its surety on its performance bond, Standard Accident Insurance Company, came to Washington to see the contracting officer in an effort to get him to set aside his order terminating plaintiff's right to proceed. The contracting officer refused to do so. No written appeal was then taken to the head of the department. Instead, an arrangement was worked out between the Veterans' Administration and the surety company, whereby the surety agreed to take over performance of the remaining work under the contract and to sublet it to plaintiff, with the understanding that plaintiff's former general superintendent, John V. Hawkins, should be replaced by a man by the name of Madsen. Pursuant to this understanding, the surety company and plaintiff entered into a contract on April 25, 1932, under the terms of which the plaintiff agreed, as the surety company's subcontractor, to perform all the remaining work under the contract, with the understanding that the defendant should make payments due thereunder to the surety, and that the surety in turn would transmit said payments to plaintiff. The contract was completed under this arrangement.

It, therefore, appears that instead of appealing from the finding of fact by the contracting officer, on the basis of which he terminated the contract, plaintiff acquiesced therein and entered into a substitute arrangement for the further performance of the contract.

Plaintiff, therefore, is bound by the contracting officer's finding that it was not pursuing the contract with such diligence as would insure its completion on time. This fact justified the contracting officer in terminating the contract.

Plaintiff, therefore, is not entitled to recover whatever damages may have been suffered thereby.

The commissioner finds that the plaintiff has been paid the sum of $5,130.00 for work done under the contract prior to its termination. Plaintiff takes no exception thereto and does not now contend that any more is due for work done prior to the termination of the contract.

Since it is clear that plaintiff is not entitled to recover, for the reasons stated, we do not consider whether or not the contracting officer was in fact justified in terminating the contract, nor whether plaintiff was damaged thereby.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

PUTNAM KNITTING COMPANY v. THE UNITED STATES

[No. 45453. Decided January 8, 1945]

On the Proofs

Floor stocks tax under Agricultural Adjustment Act; refund of floor stocks tax on cotton; price list and loss on sales as evidence; shifted burden of tax.—Where taxpayer, a manufacturer of cotton goods, concedes that on goods sold before November 1, 1933, it recovered the floor stocks tax assessed under the Agricultural Adjustment Act (48 Stat. 31), in accordance with its advertised price list, effective August 1, 1933, which contained the statement "floor tax included in all the above prices;" and where the new price list in effect after November 1, 1933, omitted such statement and quoted new prices which were, on many items, lower than those on the previous list; and where during the period in question and subsequent thereto it lost money on its sales; it is *held* that the price lists and the claimed losses on sales do not constitute sufficient proof that the tax on such sales was not recovered from its purchasers and plaintiff is not entitled to recover.

Same; burden of proof under Section 902, 49 Stat. 1648, 1747.—Plaintiff did not sustain the burden of proof imposed by Section 902 of the Revenue Act of 1936 (49 Stat. 1648, 1747).

The Reporter's statement of the case:

Mr. Howe P. Cochran for the plaintiff. *Miss Margaret F. Luers* and *Mrs. Betty Cochran Stockvis* were on the briefs.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Fred K. Dyar* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is and was, at all times relevant to the matters herein involved, a corporation duly organized and existing under the laws of the State of New York, and having its principal office and place of business at Cohoes, New York.

2. Plaintiff duly filed its floor stocks tax return covering floor stocks taxes imposed by the Agricultural Adjustment Act on floor stocks on hand August 1, 1933, and paid the tax shown by such return in the amount of $8,173.24, as follows: $2,043.31 each on September 22, October 7, November 7, and December 28, 1933.

3. Plaintiff filed a claim for refund in the amount of $8,173.24 for floor stocks taxes paid by it under the said Agricultural Adjustment Act, on the 30th day of June, 1937, which was within the statutory period allowed for filing such claim. On May 26, 1939, the Commissioner of Internal Revenue notified plaintiff that its claim for refund was rejected in full. Refund has, however, been made to plaintiff in the amount of $256.93, leaving $7,916.31 unrefunded. Of this $7,916.31 the burden of the tax on the goods sold by the plaintiff from August 1 to November 1 was passed on by plaintiff to its customers and collected from them. Plaintiff's claim is reduced accordingly.

4. Plaintiff manufactures out of cotton yarn and sells face washcloths, dishcloths and certain baby specialties. The plaintiff used the accrual system of accounting and a first-in-first-out basis of inventory. On this basis the plaintiff claims that the inventory on hand August 1, 1933, would not have been used up before April 4, 1934.

5. Beginning August 1, 1933, the plaintiff added to its invoices, to the purchasers to whom it sold its products, the amount of the floor stocks tax as a part of the sales price.

Its advertised price list, effective August 1, 1933, bore a notation: "Floor tax included in all the above prices." This price list continued in effect until November 1, 1933. Thereafter a new price list effective on that date was published without the notation about the tax.

6. For the six months' period ending December 31, 1933, plaintiff had a loss of $18,573.05, and for the three months' period ending March 31, 1934, a loss of $8,781.21. As stated in finding 2, it paid floor stock taxes of $8,173.24. It attributes $4,472.52 of this amount to goods sold before December 31, 1933, and $3,700.72 to goods sold after that date.

7. The prices at which plaintiff sold its goods (1) before August 1, 1933, (2) beginning August 1, 1933, and (3) beginning November 1, 1933, varied, upward and downward. In the November 1 list, the prices of many items remained unchanged, but, of the prices changed, most changes were downward.

8. Plaintiff's manufacturing cost per pound for the six months ending June 30, 1933, was $.32089; for the six months ending December 31, 1933, $.50244; and for the three months ending March 31, 1934, $.50537.

9. It is not proved that the burden of the floor stocks tax herein claimed, was not passed on to its customers.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, a manufacturer of washcloths, baby blankets, etc., was taxed, by Section 16 (a) (1) of the Agricultural Adjustment Act, 48 Stat. 31, 7 U. S. C. 616, a certain amount per pound on the stocks of cotton goods which it had on hand on August 1, 1933. This tax was known as a floor stocks tax. It amounted to $8,173.24, which the plaintiff paid.

The Supreme Court of the United States, on January 6, 1936, held the Agricultural Adjustment Act unconstitutional,[1] and the plaintiff filed a claim for refund of the $8,173.24. But Congress, by Section 902 of the Revenue Act

[1] *United States* v. *Butler, et al.*, 297 U. S. 1.

of 1936, placed restrictions upon the recovery of a tax paid under the Agricultural Adjustment Act, because it thought that in many cases the one who paid the tax would have passed it on, in the sale price, to those who purchased his product, and that if he recovered the tax from the Government he would not merely be recovering the amount of an illegal levy collected from him, but would be unjustly enriching himself by obtaining payment a second time for an expenditure for which his customers had already reimbursed him.

The applicable part of Section 902 is as follows:

> SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS. No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; * * * (49 Stat. 1648, 1747).

The plaintiff's claim for refund was rejected by the Commissioner of Internal Revenue, but a refund of $256.93 was later made, leaving a balance of $7,916.31 unrefunded.

As we have said, the floor stocks tax was paid on goods on hand August 1, 1933. On that day the plaintiff began to

add to its sales invoices to customers as a separately stated item, the amount of the floor stocks tax. How long the practice of separate billing was continued, does not appear from the evidence. Its advertised price list, effective August 1, contained a statement: "Floor tax included in all the above prices." This price list continued in effect until November 1, 1933, when a new price list, not containing the quoted statement, was issued. The plaintiff concedes that, on the goods which were sold before November 1, 1933, it recovered the tax from its customers, and must reduce its claim here. There is, however, a controversy as to whether the amount so recovered was $2,058.89, as claimed by the plaintiff, or $2,638.85 as claimed by the Government.

The plaintiff's ultimate claim, then, is to recover the amount of the tax which it paid on such of its goods on hand August 1, 1933, as were sold by it on and after November 1, 1933. As to these, it urges, it did not receive, in its sales price to its customers, the amount of the tax. The possible significance of the November 1 date seems to be that the new advertised price list in effect as of that date made no mention of the floor stocks tax, and quoted new prices which were, on many items, lower than those on the previous list.

As to the omission of mention of the tax on the November 1 price list, that, in itself proves nothing as to whether the tax was passed on after that date, as the plaintiff concedes that it was before. Prospective purchasers would have had no interest in the presence or absence of such a statement, since in any event they would not have become liable for the tax even if the plaintiff had not paid it. Their only interest would have been in the price, regardless of how the plaintiff had arrived at it. The plaintiff's purpose, during the August 1–November 1 period, in mentioning the floor stocks tax, must have been to justify its prices and show its customers at least one of the items which made up its costs.

As we have said, the November 1 price list quoted lower prices on some items and the same or higher prices on others. The reductions did not correspond with the amount of the tax on the reduced items, and were evidently made in response to market conditions. The reduction of prices does

not, therefore, in itself constitute proof that the tax was not recovered from purchasers.

The real basis for the plaintiff's claim that it bore the burden of the tax is that, during the period in question, it lost money on its sales. It urges that it could not possibly have received, in the prices it charged its customers, the amount of the tax, when what it received was not even enough to pay its manufacturing and selling costs. There is a certain plausibility about this argument, but it is not, upon examination, sound. The tax was one element of cost to which every competitor of the plaintiff was uniformly subject. The selling price of the product of all these competitors would, therefore, naturally tend toward a level higher, by the amount of the tax, than they had been before. A high cost manufacturer who had, before the tax was imposed, lost money or made an inadequate profit, could, in general, increase his prices by the amount of the tax and still retain his relative position in the market, losing money or making an inadequate profit as he had before. A low cost manufacturer who had been making large profits before could continue to do so, by raising his prices by the amount of the tax. And other manufacturers between these two extremes would, in general, retain their same relative positions in the market.

The plaintiff, during the six months ending December 31, 1933, lost $18,573.05. During one of those months, July, there was no floor stocks tax. During three of them, August, September and October, it concededly passed to its customers, in its sales prices, the amount of the tax attributable to the goods sold during those months. For the months of January, February and March, 1934, during which time it claims that it sold the rest of the stocks which had been on hand August 1, 1933, and which were, therefore, taxed, it lost $8,781.21. Its loss was, therefore, at a somewhat lower rate during these months than during the 1933 months.

On the basis of these facts, we have no idea what were the reasons why the plaintiff did not get enough for its product, including its taxed product, to reimburse it for what it spent for manufacture, selling, and taxes. We likewise do not know whether the prices which the plaintiff did receive were,

though inadequate to cover its costs, higher by the amount of the tax than they would have been if the tax, applicable to the plaintiff and its competitors, had not been imposed. If the latter is true, and Section 902 quoted above creates, in effect, a presumption that it is true, then the plaintiff cannot recover. And the plaintiff has the burden, a difficult one to bear, of negativing, by proof, the presumed situation.

The petition will be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

HARRY B. STOTT v. THE UNITED STATES

[No. 45650. Decided January 8, 1945]

On the Proofs

Pay and allowances, bachelor officer in the United States Navy with dependent mother.—Following the decision in *Mumma* v. *United States*, 99 C. Cls. 261, it is *held* that plaintiff is entitled to recover where it is shown that his cash contribution per month to his mother's support was substantially one-half of her expenses, was her largest source of income, and without it she would have been in financial distress. See *Chester V. Freeland* v. *United States*, 64 C. Cls. 364.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff was commissioned an ensign in the United States Navy on June 2, 1938, which rank he held until June 2, 1941, when he was commissioned lieutenant, junior grade. He held the latter rank until June 2, 1942, when he was commissioned lieutenant, senior grade, and which rank he

has held since that time. He was a bachelor officer until July 17, 1942, when he was married.

2. Plaintiff's father died intestate April 9, 1925. He left $2,000 in insurance to his widow, plaintiff's mother, and she and her three children inherited from him a house in Albuquerque, New Mexico. The house was heavily mortgaged and the widow received about $750 from her interest in it which was paid to her about 1926. The insurance money as well as the money realized from the interest in the house was spent by plaintiff's mother prior to 1939.

3. Plaintiff's mother is more than fifty-five years of age and is in poor health. Since September 1, 1939, she has held no gainful employment and has owned no income-producing personal property but has owned certain real estate as hereinafter shown.

4. In April or May 1938, plaintiff's mother purchased at public auction for $75 a fishing pier located in Lewes, Delaware, which belonged to her father's estate. While she still owns the pier, a large part of it was destroyed by ice during January 1940 and she has not had the funds with which to repair it. Before its partial destruction she realized an income of from $350 to $400 a year from fees charged fishing parties using the pier. That income was earned during the summer months of 1938 and 1939 but she has realized no income of any consequence from the pier since September 1939.

5. In November 1938, plaintiff's mother purchased at public auction from her father's estate a house in Lewes, Delaware, for the sum of $3,201. She made a cash payment of $701 and obtained a mortgage on the house for the balance of $2,500, which mortgage provided that it should be paid off at the rate of $25 a month. The cash payment of $701 was made up in part from a small amount of cash received from her father's estate and in part from money which she had realized from the operation of the fishing pier.

6. Prior to the death of her father in 1934, plaintiff's mother sold health, accident, and automobile insurance but she gave up this work after his death. Since 1934 and including the years involved in this claim she has realized

approximately $5 a month as renewal commissions on insurance which she had sold in and prior to 1934.

7. From September 1939 to June 1941, for nine months of each year, plaintiff's mother received $35 a month from each of two school teachers to whom she furnished room and board. Since June 1941, she has rented rooms in her home from which she has received an average gross income of approximately $25 a month. How much of the amounts received in the foregoing manner represented profit is not shown from the record other than that such amounts helped in the payment of fuel bills and other necessary expenses incurred in connection with the maintenance of the mother's home.

8. Since September 1, 1939, plaintiff's mother has lived in her home at Lewes, Delaware, referred to in finding 5. Her living expenses have amounted to approximately $100 a month including payments on interest and principal of mortgage, food, coal and oil, gas, electricity, telephone, taxes, insurance, medical expenses, clothing, and miscellaneous items.

9. Plaintiff's mother has two children besides plaintiff—a son, Robert, twenty-seven years of age, and a daughter, Elizabeth, twenty-four years of age. These two children are unmarried and neither has lived with the mother since September 1939.

Robert was employed in the Lighthouse Service from sometime prior to 1938 until 1940 when that service was merged with the Coast Guard and he entered the latter service as an enlisted man. He now holds the grade of boatswain's mate, first class. Prior to June 1938, he contributed approximately $30 a month to his mother and since plaintiff was commissioned an ensign in June 1938, Robert has contributed approximately $15 a month.

Elizabeth finished college in June 1941 and then taught school until about July 1943 when she was commissioned an ensign in the "Waves." She has never contributed anything to her mother's support except for occasional presents of clothing and items of that character during the period when she was teaching.

10. Plaintiff regularly contributed $45 a month in cash toward his mother's support from June 2, 1938 to June 2, 1941; $60 a month from June 3, 1941 to June 2, 1942; and $75 a month thereafter. In addition, plaintiff carried during all this time $10,000 in a Government insurance policy in which his mother was named as the beneficiary, and paid premiums on it of not less than $7 per month.

11. Plaintiff's contributions constituted his mother's chief support from September 1, 1939 to July 17, 1942, the date of his marriage.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, an officer in the Navy, claims that he was, for the period September 1, 1939 to July 17, 1942, the chief support of his mother, and should have been paid the increased rental and subsistence allowances which the statutes authorized for an officer with a dependent mother. The statutes relied on for the period before June 1, 1942, are Sections 4, 5, and 6 of the Act of June 10, 1922, 42 Stat. 625, as amended by the Act of May 31, 1924, 43 Stat. 250. The pertinent statutory provisions for the period after June 1, 1942, are Sections 4, 5, and 6 of the Act of June 16, 1942, 56 Stat. 359.

Finding 8 shows the amount of the mother's living expenses, and finding 10 the amount of the plaintiff's contributions toward those expenses during the period on which this claim is based. The Government concedes that from June 3, 1941, the plaintiff was his mother's chief support, since he contributed $60 per month toward her living expenses of $100 per month. It urges that, up to June 3, 1941, he had only contributed $45 per month; hence was not her chief support for the period. The plaintiff urges that since his cash contributions, averaged over the entire period of the claim, constituted more than one-half of the mother's living expenses for the entire period, he was her chief support within the meaning of the statute. The plaintiff also urges that even during the period preceding June 3, 1941, when he was contributing only $45 toward her expenses of $100, he was her chief support, though his contribution was less than one-half

of her expenses. He further urges that there should be added to the amount of his cash contributions the amount, more than $7 per month,[1] which he paid as premiums on a policy of Government insurance, of which his mother was the beneficiary.

We think the plaintiff was the mother's chief support during the period in question. His cash contribution of $45 per month was substantially one-half of her expenditures, was her largest source of income, and without it she would have been in financial distress. See *Chester V. Freeland* v. *United States*, 64 C. Cls. 364. We think there is some merit in the plaintiff's other two asserted grounds of recovery, as we have stated them above, but it is not necessary for us to decide whether they or either of them would be sufficient.

The plaintiff is entitled to recover. The computation of the amount will be based upon our decision in *Mumma* v. *United States*, 99 C. Cls. 261. Entry of judgment will await the receipt of a report from the General Accounting Office showing that computation.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

HARDIN COUNTY SAVINGS BANK v. THE UNITED STATES

MASSACHUSETTS BONDING AND INSURANCE COMPANY v. THE UNITED STATES

[Departmental No. 176. Decided January 8, 1945]

On a Plea to the Jurisdiction

Claims under the Contract Settlement Act of 1944.—Under the provisions of Section 14 (b) of the Contract Settlement Act of 1944 (Public No. 395, approved July 1, 1944) a notice gives the one notified an opportunity to enter his appearance and participate in the pending proceedings, if he thinks he has an

[1] See the Veterans Administration Pamphlet, Insurance Form 398, Information and Premium Rates, National Service Life Insurance, August 1941.

interest and desires to protect it; he need not appear and participate but if he does not, the statute provides that his interest in the subject matter of the suit "shall be forever barred."

Same; jurisdiction.—The Court of Claims is the only forum in which claims against the United States, of the amount here sued for can be litigated (U. S. Code, Title 28, section 250); and where plaintiffs have properly filed their suits in the Court of Claims the court may not refuse to decide them on the ground that there is another potential claimant, viz., the trustee in bankruptcy of a bankrupt whose estate is being administered in a District Court of the United States.

Mr. Daniel Partridge, III, for the Hardin County Savings Bank.

Mr. Elmo E. McCormick for trustee in bankruptcy of Ben B. Hogenson, d. b. a. Hogenson Construction Company.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiffs, Hardin County Savings Bank, and Massachusetts Bonding and Insurance Company, have filed separate petitions. The Bank's petition, filed May 18, 1943, alleges that on June 28, 1941 Ben B. Hogenson, doing business as the Hogenson Construction Company, entered into a contract with the United States to build for it a Field Office at the Savanna, Illinois, Ordnance Depot Proving Ground, for the price of $42,892; that the Bonding Company executed two bonds whereby it guaranteed performance of the contract, and payment for labor and materials, by Hogenson; that Hogenson, with the knowledge, consent and cooperation of the Bonding Company applied to the plaintiff Bank for a loan to finance this contract and other contracts in which the Bonding Company was interested, and offered to secure the loan by an assignment to the Bank of his contract pursuant to the Assignment of Claims Act of October 9, 1940; that the Bonding Company recommended Hogenson to the Bank as a contractor and a credit risk; that the Bank, in reliance on the assignment, executed August 16, 1941, and the recommendation, made loans to Hogenson to finance his contracts.

The Bank's petition further alleges that it gave proper notice of the assignment to the various interested departments, and to the Bonding Company, the surety, as provided by the Assignment of Claims Act, notifying them to pay to the Bank all payments as they became due under the terms of the contract; that $13,250 of principal and $1,433.71 of interest, with interest still accruing, is now due and unpaid on the loans made by the Bank to Hogenson; that the Government made payments to the Bank of $4,566.33, $2,109.46, and $6,799.09 on September 3 and 9 and October 8, 1941, respectively; that these payments were not credited on Hogenson's loan but were credited to his checking account in the Bank to provide him with working capital; that on December 23, 1941, Hogenson completed the contract work, and there became due to the plaintiff Bank from the United States $28,-655.12, the unpaid balance of the contract price.

The Bank's petition further alleges that the Bank, the Bonding Company, and one Kelleher, receiver in bankruptcy of Hogenson, each made claim to the balance due under the contract; that on January 14, 1943, the Comptroller General of the United States, pursuant to Section 148 of the Judicial Code, referred the claims to this court to be tried and decided, that the Bonding Company claims that it advanced money to Hogenson to enable him to complete the contract and paid his debts to laborers and materialmen and hence is entitled to the $28,655.12; but that the Bank is informed and believes that the Bonding Company had not, on November 5, 1941, made any such advances or payments; that even if it had done so, the Bank would still have a better right to the fund than the Bonding Company; that Kelleher is no longer the receiver in bankruptcy of Hogenson and has withdrawn his claim and that a trustee in bankruptcy has been appointed for Hogenson's estate.

The plaintiff Bank asks judgment for $14,683.71, which includes interest to March 31, 1942, and, in addition, interest on the principal sum of $13,250 from that date until paid.

The petition of the other plaintiff, the Massachusetts Bonding and Insurance Company, states the facts above recited from the Bank's petition about Hogenson's contract, the Bonding Company's two bonds and Hogenson's assign-

ment to the Bank. It further alleges that prior to October 22, 1941, Hogenson abandoned performance of his contract and defaulted in payments for labor and materials; that, as required by its bonds, the Bonding Company expended $31,166.19 to pay for the completion of the contract, and for labor and materials not paid for by Hogenson; that as a result of the Bonding Company's expenditures, the contract was performed and the work was accepted by the United States; that after deducting $13,474.88 which the Government had paid the Bank on the contract price before Hogenson's default, there remained $28,655.12 of the contract price unpaid.

The Bonding Company says that it filed its claim for the entire balance with the Comptroller General of the United States, who referred the question to this court; that it denies that the Bank is entitled to any of the unpaid balance; that Hogenson was adjudicated a bankrupt by the District Court of the United States for the Northern District of Iowa, on January 30, 1942; that Elmo E. McCormick, as trustee in bankruptcy of the estate of Hogenson is claiming the entire unpaid balance; that the trustee's claim is without merit.

The Bonding Company further alleges that as surety it is entitled to the equitable right of subrogation to the balance of $28,655.12; that its right dates back to the date of giving its bonds, on or about June 28, 1941, and is superior to any right of the Bank as assignee, or the trustee in bankruptcy. It asks for judgment for $28,655.12.

The Bank and the Bonding Company having filed their petitions as above shown, the Government, pursuant to the provisions of Section 14 (b) of the Contract Settlement Act of 1944 approved July 1, 1944,* by motion requested this court to give notice to Elmo E. McCormick, trustee in bankruptcy of Ben B. Hogenson, to appear and assert and defend any interest he might have in the suit. The paper which was issued and served upon the trustee was in the form of a summons, rather than a notice, but we will regard it as a notice. The trustee, on August 8, 1944, appeared specially and solely for the purpose of filing a plea to the jurisdiction of this court, asserting that the District Court of the United

*Public No. 395.

States for the Northern District of Iowa, Central Division, as the bankruptcy court in which the bankrupt estate of Hogenson was being administered, had prior and exclusive jurisdiction to adjudge and determine the respective claims of the Bank and the Bonding Company to the sum of $28,655.12, owing by the United States. He says that Hogenson resided and was domiciled in the District and Division of that court; that on January 12, 1942, a petition in bankruptcy was filed; that on January 16 Denis M. Kelleher was by that court appointed Temporary Receiver "of the goods, wares, accounts, choses in action, real estate and all other property of whatsoever nature, and wheresoever located belonging to or being the property of, or in the possession of the above named alleged bankrupt"; that the court further found that the appointment of a receiver "was necessary to preserve the assets" which included "certain funds held by certain Government Agencies in Washington, D. C."; that the receiver notified the Government of Hogenson's bankruptcy, and advised it of its duty not to make payment of its debt to Hogenson except on order of the bankruptcy court; that the Government sent a statement showing the amount due, and a form of release prepared for Hogenson's signature; that on June 2, 1942 Elmo E. McCormick was appointed, and still is trustee of Hogenson's bankrupt estate; that the receiver turned over to the trustee all property and records of the estate; that the schedules filed on behalf of the bankrupt and the inventory of assets of the trustee included the $28,655.12 here in question as owing by the United States; that notice had been given to the creditors of Hogenson, including the plaintiffs, the Bank and the Bonding Company, of the bankruptcy proceedings and of a creditors' meeting.

The trustee in his plea to the jurisdiction further says that the plaintiff Bonding Company appeared in the Bankruptcy Court in response to the notice and filed a claim and proof therein in substantially the same amount and for the same consideration as that stated in its petition herein, and thereby consented to and invoked the jurisdiction of the Bankruptcy Court to adjudicate its rights in the $28,655.12; that the trustee brought a suit in the United States District Court

for the Northern District of Iowa on June 28, 1943, which suit is still pending, in which the two plaintiffs herein are defendants and cross petitioners, praying for the determination of the court of the respective claims of the parties to the $28,655.12, and to another item of $3,520.03 evidenced by the check of the Treasurer of the Independent School District of Clearfield, Iowa, issued in the joint name of the two plaintiffs herein, for a balance due on one of Hogenson's contracts; that the claim filed in the Bankruptcy Court by the Bonding Company includes many claims alleged to be due it for money advanced to complete other contracts of Hogenson; that the amount owing by Hogenson to the Bank and the Bonding Company cannot be determined without a full accounting of all items of debit and credit between them and Hogenson, including the school district item of $3,520.03.

The trustee's plea further says that the United States was not, at the time the petition in bankruptcy was filed and the adjudication occurred, and never has been, an adverse claimant of the $28,655.12, and has not and does not now claim any beneficial interest in it or any right to withhold it from its rightful owner; that the Bankruptcy Court's jurisdiction to determine the validity of all claims to or liens on and to collect, administer, and distribute the $28,655.12 is exclusive and not concurrent with that of any other court; that the claim of the Bank under its assignment may amount to an unlawful preference; that the Bank's security under the assignment from Hogenson may have been lost by reason of payments made by the United States to the Bank, in excess of Hogenson's debt to the Bank, but which were not applied by the Bank to the secured debt; that if the Bank receives all or a part of the $3,520.03 of the school district money, its claim against Hogenson will be correspondingly reduced; that these matters can be determined only in a bankruptcy court.

The trustee, in concluding his plea "asks that the foregoing objections and plea to the jurisdiction be sustained, and that this court cease from further proceedings against said Trustee or against the property and assets now being administered in bankruptcy by the United States District Court for the Northern District of Iowa, a Court of Bankruptcy."

It is not altogether plain what the trustee means by the conclusion of his plea. As to his prayer that this court "cease from further proceedings against said trustee" our statement above, that we would treat the paper served upon the trustee under Section 14 (b) of the Contract Settlement Act as a notice, rather than a summons, gives him that relief. A notice, under that statute, merely gives the one notified an opportunity to enter his appearance and participate in the pending proceedings, if he thinks he has an interest and desires to protect it. He need not appear and participate, but if he does not, the statute provides that his interest in the subject matter of the suit "shall be forever barred."

As to the trustee's plea that this court cease from "further proceedings against * * * the property and assets now being administered in bankruptcy" by the District Court, it cannot be granted because this court is the only forum in which claims against the United States, of the amount here involved, can be litigated. The Bank and the Bonding Company having filed their suits here, we have no right to refuse to decide them because there is another potential claimant, the trustee in bankruptcy of Hogenson's estate. If the bankrupt estate has an interest in the litigation, it may of course be asserted here, and in these pending suits, if the trustee appears, as he has the privilege of doing under the provisions of Section 14 (b) of the Contract Settlement Act of 1944. If the trustee can show that the estate, rather than the Bank or the Bonding Company, is entitled to the money involved in these suits, or any part of the money, he will be given a judgment for it. His plea to the jurisdiction is therefore denied. He is hereby granted leave to appear in the pending cases within twenty days from this date to assert and defend such interests as he may claim in the subject matter involved in the cases.

It is so ordered.

WHITAKER, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE QUINAIELT TRIBE OF INDIANS v. THE UNITED STATES

[No. L-23. Decided February 5, 1945]*

On Defendant's Motion for New Trial

Indian claims; determination of proper location of northern boundary of plaintiff tribe's reservation; land taken by the Government.—It is *held* that upon the proof presented, and in accordance with the treaties with the plaintiff tribe, and under the terms of the special jurisdictional act (43 Stat. 886), the defendant has taken and appropriated to its own use the land lying west of Quinaielt Lake and between a line drawn from 32½ Mile Post on the meander of the Lake, in accordance with the Executive Order of November 4, 1873, to the northwest corner of the reservation and a line drawn from the 28½ Mile Post on the meander of the Lake, in accordance with the Executive Order, to the northwest corner of the reservation.

Same; determination of plaintiff's interest reserved for further proceedings under Rule 39 (a).—What part of the value of the land so taken the plaintiff is entitled to recover does not appear from the proof, and judgment is reserved for further proceedings under Rule 39 (a).

Same; other tribes of fish-eating Indians on Pacific Coast entitled to equal rights in the reservation.—Under the treaty entered into between the United States and the different tribes and bands of Quinaielt and Quillihute Indians (12 Stat. 971), it was provided (article VI) that these tribes might be consolidated with other friendly tribes or bands for the purpose of occupying and enjoying the reservation; and when the Executive Order establishing the reservation was issued it set aside the reservation not only for the Quinaielts and Quillihutes but also for the Hohs, Quits and other tribes of fish-eating Indians on the Pacific Coast; and under the decision in *Halbert* v. *United States*, 283 U. S., the Chehalis, Chinook, and Cowlitz tribes were entitled to equal rights in the reservation because they came within the designation of fish-eating Indians on the Pacific Coast.

Same; plaintiffs not entitled to exclusive rights.—It is *held* that the plaintiffs, the Quinaielts, are not entitled to exclusive rights in the reservation; the Quillihutes, Hohs, Quits, Chehalis, Chinook and Cowlitz tribes being also entitled to an interest therein.

*Argued December 6, 1943.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff. *Mr. W. B. Ackerman* was on the briefs.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the briefs.

Defendant's motion for a new trial is granted and the former findings of fact, conclusion of law and opinion [October 2, 1944] are withdrawn, and the following findings, conclusion of law and opinion are substituted therefor.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. An Act of Congress approved February 12, 1925 (43 Stat. 886), reads, in part, as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all claims of whatsoever nature, both legal and equitable, of the tribes and bands of Indians, or any of them, except the S'Klallams, commonly known as the Clallams, with whom were made any of the treaties of Medicine Creek, dated December 26, 1854, Point Elliott, dated January 22, 1855, Point-no-Point, dated January 26, 1855, the Quin-ai-elts, dated May 8, 1859, growing out of said treaties, or any of them, and that all claims of whatever nature, both legal and equitable, which the Muckelshoot, San Juan Islands Indians; Nook-Sack, Suattle, Chinook, Upper Chehalis, Lower Chehalis, and Humptulip Tribes or Bands of Indians, or any of them (with whom no treaty has been made), may have against the United States shall be submitted to the Court of Claims, with right of appeal by either party to the Supreme Court of the United States for determination and adjudication, both legal and equitable, and jurisdiction is hereby conferred upon the Court of Claims to hear and determine any and all suits brought hereunder and to render final judgment therein: *Provided*, That the court shall also consider and determine any legal or equitable defenses, set-offs, or counterclaims including gratuities which the United States may have against any of said tribes or bands.

Sec. 2. That the Court of Claims shall advance the cause or causes upon its docket for hearing, and shall have authority to determine and adjudge all rights and claims, both legal and equitable, of said tribes or bands of Indians, or any of them, and of the United States in the premises, notwithstanding lapse of time or statutes of limitation.

Sec. 3. That suit or suits instituted hereunder shall be begun within five years from the date of the passage of this Act by such tribes or bands of Indians, as parties plaintiff, and the United States as the party defendant. * * *

2. A treaty was entered into between the United States and the different tribes and bands of Quinaielt (parties plaintiff) and Quillehute Indians, July 1, 1855, and January 25, 1856, which was ratified by the Senate, March 8, 1859, and proclaimed by the President, April 11, 1859 (12 Stat. 971). Article II of this treaty reads as follows:

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

3. In September 1861 the then Superintendent of Indian Affairs for Washington Territory, W. W. Miller, directed that the following tract of land should be surveyed, to be set aside for the use of the plaintiff Indians:

Commencing at a point on the Coast about five chains south of the Ne-mote-lopes or Roberts Creek and about

> three-fourths of a mile south of the Fifth Standard Parallel North of the base line, thence due east about five miles or as far as the Indian Agent may direct, thence north 15 degrees West about seven miles, thence to a point of rocks on the Coast about one mile north of the Quinaielt River, thence with the meanders of the Ocean to the place of beginning.

Plaintiffs resided on this tract of land and have continued to do so, but it was never set aside as their reservation by Executive Order until November 4, 1873, when it and certain additional lands were set aside for the use of the plaintiff Indians and of the Quillehutes, Hohs, Quits, and other tribes of fish-eating Indians of the Pacific Coast. After the date of this Executive Order the plaintiff and the Quillehutes, Hohs, Quits, Chehalis, Chinook, Cowlitz, and Ozette tribes, and any other tribes in the Territory of Washington who may have been affiliated with the Quinaielt and Quillehute tribes were entitled to equal rights in this reservation.

4. The Executive Order referred to was issued as the result of a recommendation made by R. H. Milroy, Superintendent of Indian Affairs for the Territory of Washington, on October 1, 1872. This recommendation reads in part as follows:

> As the land north and west of this reservation, for many miles, has no attractions for white settlers, and as the Quilliutes, Hohs, and Quits do not reside on the reservation, and refuse to come on to it as at present constituted, and as there is but a small amount of agricultural and pasture lands on the reservation, I recommend that it be enlarged as follows: Commencing at the northwest corner of the reservation at tidewater, on the ocean-beach, thence north with the tidewater of said beach to half a mile north of the mouth of the Queetshee River, thence easterly with the course of said river three miles, thence southeasterly to the northwest point of Quinaielt Lake, thence easterly and southerly around the east shore of said lake to the most southerly end of the same, thence southwesterly in a direct line to the northeast corner of the present reservation. The reservation thus enlarged would afford two more fisheries on the Pacific coast, and perhaps several others around Lake Quinaielt, and would afford occasional patches of

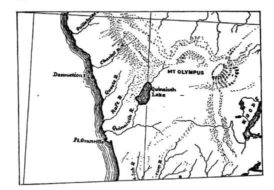
agricultural and grazing lands, and upon it should be collected not only the three tribes named, but also all the other tribes and bands of fish-eating Indians on the Pacific coast, from the south side of the Neah Bay reservation to the mouth of the Columbia River; all of whom could find room and homes on this enlarged reservation, and when thus collected, if our Government will put forth an effort to civilize and Christianize them, commensurate with her greatness and dignity, it will be done, and these "cultus Injims" and their descendants changed to orderly, intelligent, American citizens.

5. The Executive Order of November 4, 1873, is as follows:

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: Commencing on the Pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, and with the line of said survey, 5 miles to the southeast corner of said reserve thus established; thence in a direct line to the most southerly end of Quinaielt Lake thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queetshee River and 3 miles above its mouth; thence with the course of said river to a point on the Pacific coast, at low-water mark, a half mile above the mouth of said river; thence southerly, at low-water mark, along the Pacific to the place of beginning.

6. At the time the above Executive Order was issued the region around Quinaielt Lake had not been surveyed and neither the President nor those in charge of Indian Affairs knew a great deal about it. It was believed that the long axis of the Lake ran from somewhat east of north to somewhat

west of south. As a matter of fact the long axis runs about 45° east of north to 45° west of south. The Lake, as it was then conceived, is shown on a map, prepared on the order of the Secretary of War in 1859, a portion of which is reproduced below:



The Lake is more accurately shown on a map of the Quinaielt Reservation as finally defined by the defendant, dated April 2, 1894, which is reproduced herein and attached as appendix No. 1 to this opinion.

7. On September 21, 1891, the Commissioner of the General Land Office awarded to Norton L. Taylor a contract to survey plaintiff's reservation. Taylor prepared a drawing of the Lake, dated December 15, 1891, upon which he indicated the northwest point thereof as fixed by the Surveyor General on a sketch which he furnished him. This is indicated by the letter "A". It is at the 28½ Mile Post on the meander of the Lake. On this sketch the point marked "B" is the northwest point as contended for by certain white men who had settled along the Lake between points "A" and "B". Point "B" is at Mile Post 32½ on the meander of the Lake. This drawing is reproduced herein and attached as appendix No. 2 to this opinion.

8. Taylor was instructed by the Surveyor General to present to the Indian Agent for the Quinaielt Indian Reservation the controversy over the proper location of the northwest point so that the General Land Office might secure the views of the Indian Office as to the proper location of this point. This he did on December 17, 1891, in a letter which reads, in part, as follows:

> * * * the Surveyor General has asked me to refer the matter to you so that the line in question can be established to meet the approval of your Department and to relieve us of all responsibility in the matter of deciding its proper location.
>
> Two blue prints are enclosed herewith. Referring to the blue print of Quinaielt Lake:—The Surveyor General considers the westerly end of the most northern course of the meander (marked "A") to be the N. W. point of the Lake mentioned in the Treaty.
>
> About six settlers now occupy claims on the shore of the Lake between "A" and "B", having consulted two or three surveyors before moving in. As usually understood the N. W. point is where a line bearing N. 45° E. touches the northerly (or westerly) edge of the water without crossing any part of it, which would be at "B". No Indians live on or near the Lake.
>
> * * * * *
>
> Will you kindly have this matter decided at an early date as I intend to return as soon as weather permits to finish this survey.

9. In accordance with Taylor's request, the Indian Agent wrote the Commissioner of Indian Affairs on December 24, 1891 as follows:

> * * * Later in 1873, when Genl. R. H. Milroy was Supt. of Indian Affairs, and as I understand it, at his recommendation, an Executive Order was made dated November 4, 1873, enlarging it. The country was at that time entirely unexplored and the location of the lake known only by general description obtained from the Indians. It was supposed that its general course was north and south, and when the points were designated it was intended to take in the shores of about one-half of the lake. Later explorations determined the fact that the lake lies in a different direction viz: north-east and south-west, so that there is in reality no north-west point as was supposed at the time the order was

made. Within the past few years quite a number of settlers or squatters have taken claims along the shores of the lake. One of the principal ones was a gentleman by the name of Samuel C. Gilman, a former engineer in the employ of the North Pacific Railroad Company. Taking the words of the Executive Order and the general topography of the lake, he located what he supposed to be the north-west point of the lake, which he claims is according to engineering rules to be the point where a line drawn north 45 deg. east would first touch the lake. In conformity with this opinion he took up a claim and has made valuable improvements thereon. Others by his advice have done the same, among whom is a brother of E. W. Agar, the present Supt. and head teacher of the Quinaielt Indian Boarding School. The Surveyor General had designated the most northern end of the lake as the north-west point. To run the line from this point would include within the boundary of the reservation a number of claims, on which considerable improvements have been made.

I enclose herewith a drawing of the lake as made by the local surveyor, and a letter from him, also sketches made by Mr. Gilman with a letter from him. The land about the lake is entirely unoccupied by Indians, and never has been used by them except for the purpose of hunting. In case there should be transportation facilities for getting there, it is not likely they would ever use it. Should there be some way of getting in there in the near future, and no more Indians go on to the reservation than there now are, there would still be enough left that is desirable for them to use. This is about the state of the case regarding that point.

*   *   *   *   *

As regards the lake, were I looking at the map independent of any engineering rules, or any rights of settlers, taking everything into consideration, I should select a point nearly north of the south end of the lake as coming the nearest to the original intent of the order. What rules of engineering apply to it I know nothing about. I believe the parties who have gone in there have made their improvements in good faith, and not with any intention of encroaching on to the reservation, and at present they do not conflict with any claims or improvements of individual Indians, and as it is an Executive Order extension of the reservation, and not due to any obligations the Government is under to the Indians as a tribe, they could base no complaint were

they to lose this tract. Were it not for this, as I said above, I should locate it nearly north of the point where the south boundary line strikes the lake, but in consideration of all the facts, it might be best to allow these settlers to hold their claims and make the point marked "B" on the surveyor's blue print the starting point for the line to the ocean.

This I think will give you as clear a description of the case as I am able to do, and I respectfully request that you will consider it as soon as convenient, and notify the Land Office so that instructions can be given the local surveyor as soon as possible and in time for him to commence work in the spring.

* * * * *

10. On February 23, 1892, the Commissioner of Indian Affairs made his recommendation to the Secretary of the Interior in a letter reading in part as follows:

> From Agent Eell's report and the maps presented, I am inclined to believe that a strict construction of the description in the treaty would fix the north-west point of the lake at the most northerly point of the lake, as indicated by the Surveyor-General ("A" on the diagram), although this would doubtless throw the boundary further east than was intended by the Executive Order, as a sketch of the reservation made at the time shows the lake to lie in a north and south direction, instead of a north-east and south-west direction.
>
> In view of the facts, however, as stated by Agent Eells, that the Indians are not settled upon any portion of the lands affected by the confusion in the boundaries at this point, and that white settlers have located thereon, I do not think that this point should be insisted upon if the western line can be run so as to retain the lands occupied by the Indians. It is suggested that the recommendations of Agent Eells be carried into effect—that is, that the north-west point of the lake be accepted as being located at "B" on the blue print showing the lake. * * *

11. The Acting Secretary of the Interior concurred in the recommendation of the Commissioner of Indian Affairs, and so notified the Commissioner of the General Land Office.

12. On April 5, 1892, the Commissioner of the General Land Office instructed the United States Surveyor General at Olympia, Washington, to prepare supplemental instructions to Norton L. Taylor to lay out the reservation using the north-

west point as determined upon by the Interior Department, which is at point "B" on the sketch reproduced as appendix No. 2 to this opinion. The map reproduced herein as appendix No. 1 to this opinion is the map drawn by Taylor setting out his survey made in accordance with these instructions.

13. The northwest point of Quinaielt Lake designated by the Executive Order is at the 28½ Mile Post on the meander of the Lake, and the northern boundary of the reservation runs from this point to the northwest corner of the reservation in accordance with the Executive Order. The 32½ Mile Post on the meander of the Lake was adopted by the defendant as the northwest corner of Quinaielt Lake, and the northern boundary of the reservation was fixed by a line drawn from this point to the northwest corner of the reservation in accordance with the Executive Order. The lands lying between the two lines have been patented by the defendant to others or have been held adversely by defendant.

The court decided that the defendant has taken and appropriated to its own use the land lying west of Quinaielt Lake and between a line drawn from the 32½ Mile Post on the meander of the Lake to the northwest corner of the reservation, as provided for in the Executive Order, and a line drawn from the 28½ Mile Post on the meander of the Lake to the northwest corner of the reservation, drawn in accordance with the Executive Order. What part of the value of said land plaintiff is entitled to recover does not appear from the proof.

Judgment was reserved for further proceedings under rule 39 (a) of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues for the value of the lands of which it alleges it has been deprived as a result of the erroneous location of its northern boundary.

By a treaty between the United States and plaintiff and the Quillehute Indians entered into on July 1, 1855, and January 25, 1856, respectively, and ratified by the Senate on March 8, 1859, these Indians ceded to the United States all the lands to which they laid claim except a tract "sufficient

for their wants within the Territory of Washington to be selected by the President of the United States and hereafter surveyed or located and set apart for their exclusive use * * *."

No selection was made by the President until November 4, 1873, but in September 1861 the then Superintendent of Indian Affairs for Washington Territory, W. W. Miller, had a survey made of a tract of land on the Pacific Coast, and this was set apart by him for the use of the Quinaielts and the Quillehutes, and some or all of the members of these tribes have continued to reside upon it.

On October 1, 1872, the then Superintendent of Indian Tribes for Washington Territory, R. H. Milroy, recommended that the so-called reservation be enlarged by the addition to it of a tract of land which he described as follows:

> Commencing at the northwest corner of the reservation at tidewater, on the ocean-beach, thence north with the tidewater of said beach to half a mile north of the mouth of the Queetshee River, thence easterly with the course of said river three miles, thence southeasterly to the northwest point of Quinaielt Lake, thence easterly and southerly around the east shore of said lake to the most southerly end of the same, thence southwesterly in a direct line to the northeast corner of the present reservation.

This was approved, and on November 4, 1873, an Executive Order was issued formally designating the reservation as provided for by the Treaty of 1859. It included the reservation selected by Superintendent Miller. It was described as follows:

> Commencing on the Pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, and with the line of said survey, 5 miles to the southeast corner of said reserve thus established; thence in a direct line to the most southerly end of Quinaielt Lake thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queetshee River and 3 miles above its mouth; thence with the course of said

river to a point on the Pacific coast, at low-water mark, a half mile above the mouth of said river; thence southerly, at low-water mark, along the Pacific to the place of beginning.

The controversy is over the location of the northwest point of the Quinaielt Lake. Plaintiff claims it is at the point marked "A" on the map mentioned in finding 7 (appendix No. 2 to this opinion); the defendant claims it is at point "B" shown thereon.

Point "B" was adopted by the defendant, and the lands lying between a line drawn from it to the northwest corner of the reservation and a line drawn from Point "A" to the northwest corner have been patented to others or have been held by defendant adversely to plaintiff.

Point "B" is at Mile Post 32½ on the meander of the Lake. The defendant says the northwest point of a body of water is that point which is first touched by a line drawn north 45° east, and which does not pass through any portion of the water, and that this is at Point "B." This may or may not be a rule applicable in some cases, but it is clearly not applicable here. Its application to this body of water fixes the point not at the northwest, but at substantially the southwest point of the Lake.

The call in the Executive Order is from the "most southerly end of Quinaielt Lake, thence northerly around the east shore of said Lake to the northwest point thereof." If defendant were correct in its position, the call would have had to read: thence northerly and southerly around the east and west shores of the Lake to the point where a line drawn north 45° east first touches the Lake. The call of the Executive Order runs only in a northerly direction, not southerly, and it runs only along the eastern shore, and not southerly down the western shore.

Superintendent Milroy, in describing the land to be added to the reservation, began at the northwest corner of the old reserve, and thence went north along the shore of the Pacific Ocean to a point on the ocean a half mile north of the mouth of the Queetshee River, thence three miles easterly with the course of the river, and from there the description continues: "thence southeasterly to the northwest point of Quinaielt

Lake, thence easterly and southerly around the east shore of said Lake to the most southerly end of the same * * *."

The description of the northern and eastern boundary in the Executive Order is the same as Superintendent Milroy's. It is apparent that Superintendent Milroy did not have in mind point "B" as being the northwest point of the Lake. If he had had, his description would have read: thence southeasterly to the northwest point of Quinaielt Lake, thence easterly and northerly and then southerly and westwardly around the shores of said Lake to the most southerly end of the same.

Point "B" fits neither the description in the Executive Order nor Superintendent Milroy's description.

Point "A" is the point fixed by the Surveyor General. Both Indian Agent Eells and the Commissioner of Indian Affairs recognized it as the point intended by the Executive order. Point "B" was adopted from a consideration of expediency only, as shown by the letter of the Commissioner of Indian Affairs to the Secretary of the Interior. He says:

> In view of the facts, however, as stated by Agent Eells, that the Indians are not settled upon any portion of the lands affected by the confusion in the boundaries at this point, and that white settlers have located thereon, I do not think that this point should be insisted upon if the western line can be run so as to retain the lands occupied by the Indians. It is suggested that the recommendations of Agent Eells be carried into effect—that is, that the north-west point of the lake be accepted as being located at "B" on the blueprint showing the lake. * * *

It seems to us clear that the northwest point, as that expression was used in the Executive Order, is that place on the western shore which is farthest north. This is the only point that fits the call of the Executive Order and Superintendent Milroy's recommendation. This is at Mile Post 28½ on the meander of the Lake.

But defendant says that this plaintiff is not entitled to recover the value of the lands lying between the correct northern boundary and the one adopted, because under the treaty and the Executive Order other tribes are entitled to an interest in the reservation.

The treaty was entered into with both the Quinaielts and the Quillehutes, and article VI of it provided that these tribes might be consolidated with other friendly tribes or bands for the purpose of occupying and enjoying the reservation; hence, when the Executive Order establishing the reservation was issued, acting under the authority of article VI, it set aside the reservation not only for the Quinaielts and the Quillehutes, but also for the Hohs, Quits, and other tribes of fish-eating Indians on the Pacific Coast. And the Supreme Court held in *Halbert* v. *United States*, 283 U. S. 753, that the Chehalis, Chinook, and Cowlitz tribes were entitled to equal rights in the reservation because they came within the designation of fish-eating Indians on the Pacific Coast.

It is plain, therefore, that the Quinaielts are not entitled to exclusive rights in the reservation. The Quillehutes, Hohs, Quits, Chehalis, Chinook, and Cowlitz tribes are also entitled to an interest therein.

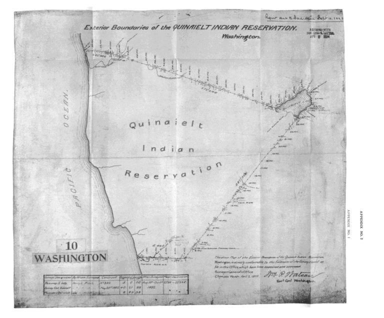
The lands taken are those lying west of Quinaielt Lake and between a line drawn from the 32½ Mile Post on the meander of the Lake, in accordance with the Executive Order, to the northwest corner of the reservation, and a line drawn from the 28½ Mile Post on the meander of the Lake, in accordance with the Executive Order, to the northwest corner of the reservation. What part of the value of these lands plaintiff is entitled to recover, if any, is not shown by the proof.

Judgment will be reserved for further proceedings under Rule 39 (a). It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

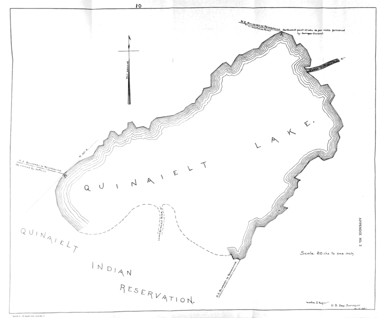
JONES, *Judge*, took no part in the decision of this case.





Exterior Boundaries of the QUINAIELT INDIAN RESERVATION.
Washington.
RECEIVED WITH SUR. GENL'S. LETTER. APR 2 1894
PACIFIC
OCEAN.
Quinaielt
Indian
Reservation
10
WASHINGTON
The above Map of the Exterior Boundaries of the Quinaielt Indian Reservation, Washington, is strictly conformable to the Fieldnotes of the Survey thereof on file in this Office, which have been examined and approved.
Surveyor General's Office
Olympia Wash. April 2, 1894
Wm. P. Watson
Surt Genl Washington.
Surveys designated
By Whom Surveyed
Contract
When Surveyed
Mean declination
Henry L. Fitch
No 382
May 23rd 1892
1892.





APPENDIX NO. 2



CASES DECIDED

IN

THE COURT OF CLAIMS

July 1, 1944, to January 31, 1945

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. K–344. December 4, 1944

The Indians of California.

Indian claims; special jurisdictional act; treaties not ratified; title under Mexican law; use and occupancy; cession.

Decided October 5, 1942; claimants entitled to recover, subject, however, to offsets, if any, and amount of recovery and offsets, if any, to be determined under Rule 39 (a), Opinion 98 C. Cls. 583. Motion for new trial overruled January 4, 1943.

Plaintiffs' petition for writ of certiorari denied by the Supreme Court June 7, 1943; 319 U. S. 764.

In accordance with the opinion of the court (98 C. Cls. 583) and the order of the Supreme Court denying certiorari (319 U. S. 764), the case having been referred to a commissioner of the court to ascertain values, a stipulation was filed by the parties, which in part is as follows:

II

That the area of land for which the plaintiff Indians are entitled to recover under the aforesaid jurisdictional act as found by this Court in its decision of October 5, 1942, is 8,518,900 acres; that the value of said land per acre as fixed by the aforesaid jurisdictional act is $1.25; that the total value of said land for which the plaintiff Indians are entitled to recover is the sum of $10,648,625.

III

That there has been set aside by the United States for the plaintiff Indians as reservations and otherwise, by

Executive Orders, acts of Congress or otherwise a total of 611,226 acres of land, which it is agreed had a value of $1.25 per acre, or a total value of $764,032.50; that the defendant is entitled to a credit or offset of said sum of $764,032.50 against plaintiffs' recovery on account of land; that plaintiffs' net recovery on account of land shall be $10,648,625, minus $764,032.50, or $9,884,592.50

IV

That the definite items provided for in the unratified treaties involved in this litigation, consisting of goods, wares, merchandise, and other chattels, which would have been furnished if the treaties referred to in Exhibit "A" to the petition herein had been ratified, were of the value of $1,407,149.48, which amount the plaintiffs are entitled to recover under the jurisdictional act and the aforesaid decision of this Court.

V

That the services and facilities which would have been supplied if the said treaties had been ratified would have been furnished for a period of twenty-five (25) years and would have cost the United States the sum of $5,762,200 to supply, which amount the plaintiffs are entitled to recover under the jurisdictional act and the aforesaid decision of this Court.

VI

That the total amount which it is agreed the plaintiffs are entitled to recover under the aforesaid jurisdictional act and the decision of this Court, subject however under the aforesaid act and decision to the offsets specified in the following paragraph No. VII of this stipulation, is as follows:

On account of land as specified in paragraphs II and III of this stipulation	$9, 884, 592. 50
Definite treaty items as specified in paragraph IV of this stipulation	1, 407, 149. 48
Services and facilities as specified in paragraph V of this stipulation	5, 762, 200. 00
Total	17, 053, 941. 98

VII

That the total amount available to the defendant in this action as offsets against the plaintiffs' recovery under the terms of the aforesaid jurisdictional act is made up of the following items:

Disbursements made out of "specific appropriations for the support, education, health, and civilization of Indians in California"	$5, 547, 805. 87
Disbursements made out of appropriations for the Indian Service generally but by the appropriation acts certain amounts were apportioned to the Indian Service in California	1, 573, 249. 66
Out of disbursements made for the support and maintenance of the non-reservation Indian schools at Fort Bidwell, Greenville, and Riverside, California	4, 908, 044. 11
Total	12, 029, 099. 64

VIII

That the aforesaid offsets in the total sum of $12,029,-099.64, as set out in paragraph VII above, shall be deducted from the total amount which the plaintiff is entitled to recover, as stated in paragraph VI above, namely, $17,053,941.98, making the net amount for which judgment may be entered by the Court the sum of $5,024,842.34.

Whereupon, following the filing of a report by the commissioner stating that "net recovery in favor of the plaintiffs is recommended in the sum of $5,024,842.34," it was ordered December 4, 1944, that judgment for the plaintiffs be entered in the net sum of $5,024,842.34.

No. 45950. OCTOBER 2, 1944

Huston St. Clair et al, trading as Virginia Smokeless Coal Company.

Government contract for coal. Upon a stipulation filed by the parties and agreement to comprise, and upon a memorandum report by a commissioner recommending that judgment be entered for the plaintiff in the agreed sum of $2,850.00, and on plaintiff's motion for judgment, it was ordered October 2, 1944, that judgment for the plaintiff be entered in the sum of $2,850.00.

No. 45951. OCTOBER 2, 1944

Sovereign Pocahontas Company.

Government contract for coal. Upon a stipulation filed by the parties, and an agreement to compromise, and upon a memorandum report by a commissioner recommending

that judgment be entered for plaintiff in the agreed sum of $7,500.00, and upon plaintiff's motion for judgment, it was ordered October 2, 1944, that judgment for the plaintiff be entered in the sum of $7,500.00.

No. 45003. NOVEMBER 6, 1944

Pocahontas Fuel Company, Inc., a Corporation.

Government contract for coal. Upon a stipulation filed by the parties and agreement to compromise, and upon a memorandum report by a commissioner recommending that judgment be entered for the plaintiff in the agreed sum of $16,500.00, and upon plaintiff's motion for judgment, it was ordered November 6, 1944, that judgment for the plaintiff be entered in the sum of $16,500.00.

JUDGMENTS ENTERED UNDER THE ACT OF JUNE 25, 1938

In accordance with the provisions of the Act of June 25, 1938 (52 Stat. 1197), and on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the report of a commissioner in each case recommending that judgment be entered in favor of the respective plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Administration Act:

ON OCTOBER 2, 1944

No. 44437. The Michigan Trust Company, as Receiver of The Macey Company, a Dissolved Corporation.. $7,724.82

ON DECEMBER 4, 1944

No. 44092. Hygrade Sylvania Corporation................ 6,622.74

ON JANUARY 8, 1945

No. 44027. Great Lakes Construction Company........... 22,536.71

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON OCTOBER 2, 1944

45436. L. E. Stemmler.
45671. United States Trust Co. of New York, et al., Executors.
45687. The Coca-Cola Company.
45706. Selby Shoe Company.
45738. Henry Hetkin, et al.
45750. Wilson & Co., Inc., a corporation.
45758. United States Trust Co. of New York, et al., Executors.
45805. John S. McColl, Donald S. Gilmore, et al., Executors.
45808. Frederick W. McReynolds.
45829. United States Trust Co. of New York, et al., Executors.
45872. Herman D. Cornell.
45941. Sadie Wilckes.
46068. Dawson Cotton Oil Company.
46081. Roswell C. Parker and Douglas B. Parker, Executors.
46103. Elgin, Joliet and Eastern Railway Company.

ON NOVEMBER 6, 1944

45595. The Franklin Sugar Refining Co.
45909. Tide Water Associated Oil Co.

ON DECEMBER 4, 1944

45935. The Howard Paper Company.

ON JANUARY 8, 1945

45479. Interstate Bakeries Corporation, et al.
45530. Interstate Bakeries Corporation, et al.
45881. Jamaica National Bank of New York.
46005. A. L. Shapleigh.
46040. Phoenix Securities Corporation.
46114. Ava Ribblesdale.

Case Relating to Infringement of Patents

ON OCTOBER 2, 1944

45586. Wesley Wait.

Cases Involving Pay And Allowances

ON OCTOBER 2, 1944

45747. William A. Johnson.

ON NOVEMBER 6, 1944

46031. Lester N. Medaris.

ON DECEMBER 4, 1944

45619. Roy L. Fisher.

ON JANUARY 8, 1945

45684. John J. Greden.
45729. Walter R. Loewe.
46211. Charles Anderson.

Cases Involving Government Contracts

ON NOVEMBER 6, 1944

46098. Mario R. Barbadora, etc.

ON DECEMBER 4, 1944

45562. Booth & Flinn Company.

Cases Under the NIRA Act of June 25, 1938

ON DECEMBER 4, 1944

44430. Brand Investment Company.
44431. Brand Investment Company.
44474. Ralph Sollitt & Sons Construction Co.
44551. Henry Ericsson Company.

ON JANUARY 8, 1945

44380. Chicago Stone Setting Company.

Cases Pertaining to Government Salary

ON DECEMBER 4, 1944

(Following the decisions in *Coleman* v. *United States*, 100 C. Cls. 41, and *Dvorkin* v. *United States*, 101 C. Cls. 296; certiorari denied 323 U. S. 730):

45787. Charles I. Frankel.
45811. Edward J. Deutinger.
45812. Lewis P. Greer.
45813. Joseph Magis.
45814. Emmett R. McBain.
45815. Theodore L. Schoenhofen.
45816. Julius J. Surovy.
45817. Cornelius Vander Kooi.
45818. Glenn Waldon.
45819. George Waters.

Cases Relating to Taking of Land

ON NOVEMBER 6, 1944

46124. N. W. Hubbard, Receiver.

ON JANUARY 8, 1945

46039. National Airlines, Inc.

Miscellaneous

ON AUGUST 30, 1944

46034. Fourth and Market Realty Corporation.

ON JANUARY 8, 1945

45731. Antoinette E. Paquette, Executrix.



REPORT OF DECISIONS
OF
THE SUPREME COURT
IN COURT OF CLAIMS CASES

CHARLES S. LOBINGIER v. THE UNITED STATES

[No. 45824]

[100 C. Cls. 448; 323 U. S. 709]

Civilian employee of Government transferred to new official station not entitled to expenses of packing, crating and drayage of household goods unless and until transported.

Decided December 6, 1943, defendant's demurrer sustained and petition dismissed. Plaintiff's motion for new trial overruled February 7, 1944.

Plaintiff's petition for writ of certiorari *denied* October 9, 1944.

MAGNOLIA PETROLEUM COMPANY v. THE UNITED STATES

[No. 45678]

[101 C. Cls. 1; 323 U. S. 721]

Taxes on transportation of petroleum products by pipe line by privately owned facilities.

Decided January 3, 1944, petition dismissed. Plaintiff's motion for new trial overruled April 3, 1944.

Plaintiff's petition for writ of certiorari *denied* October 9, 1944.

JACOB DVORKIN v. THE UNITED STATES

[No. 45912]

[101 C. Cls. 296; 323 U. S. 730]

Government salary applicable to office to which appointment is made, independent of duties performed.

Decided April 3, 1944, petition dismissed. Plaintiff's motion for new trial overruled May 1, 1944.

Plaintiff's petition for writ of certiorari *denied* October 9, 1944.

ALLEN POPE, PETITIONER, v. THE UNITED STATES

[No. 45704]

[100 C. Cls. 375; 323 U. S. 1]

Certiorari (321 U. S. 761) to review the dismissal of a proceeding brought in the Court of Claims pursuant to a special jurisdictional act (56 Stat. 1122) which the Court of Claims held unconstitutional.

The judgment of the Court of Claims was *reversed*, November 6, 1944.

Mr. Chief Justice STONE delivered the opinion of the court, stating:

By the Special Act of February 27, 1942, Congress conferred upon the Court of Claims jurisdiction to hear, determine and render judgment upon certain claims of a contractor against the Government, in conformity with directions given in the Act. The court had previously denied recovery on the claims. The Act authorized review here by certiorari. *Held:*

1. The Act is to be construed not as setting aside the judgment in a case already decided or as changing the rules of decision for the determination of a pending case, but rather as creating a new obligation of the Government to pay the contractor's claims where no obligation existed before. *United States* v. *Klein*, 13 Wall. 128, distinguished.

(a) There is no constitutional obstacle to Congress' imposing on the Government a new obligation where none existed before, for work performed by the contractor which was beneficial to the Government and for which Congress thought he had not been adequately compensated.

(b) The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those debts which are legally binding on the Government, but ex-

tends to the creation of such obligations in recognition of claims which are merely moral or honorary.

2. By the creation of a legal, in recognition of a moral, obligation to pay the contractor's claims, Congress did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal.

3. Nor did the Act encroach upon the judicial function of the Court of Claims by directing that court to pass upon the contractor's claims in conformity to the particular rule of liability prescribed by the Act and to give judgment accordingly.

(a) By the Act, Congress in effect consented to judgment in an amount to be ascertained by reference to specified data.

(b) When a plaintiff brings suit to enforce a legal obligation it is not any the less a case or controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable.

(c) Whether the Act makes the findings in the earlier suit conclusive, and, if not, whether the evidence would establish the facts on which the Act predicates liability, are judicial questions.

(d) Whether the facts be ascertained by proof or by stipulation, it is still a part of the judicial function to determine whether there is a legally binding obligation and, if so, to give judgment for the amount due even though the amount depends upon mere computation.

4. The Act authorized the claimant to invoke the judicial power of the Court of Claims and he did so.

5. The appellate jurisdiction conferred upon this Court by Art. III, § 2, cl. 2 of the Constitution extends to decisions of the Court of Claims rendered in exercise of its judicial functions, and such appellate review is not precluded by the fact that Congress has also imposed upon the Court of Claims non-judicial functions of an administrative or legislative character.

6. The Court of Claims' determination that the Act conferred upon it only non-judicial functions and hence that it had no judicial duty to perform was itself an exercise of judicial power reviewable here. *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, distinguished.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

DAVID McD. SHEARER v. THE UNITED STATES

[No. 41829]

[87 C. Cls. 40; 101 C. Cls. 196; 323 U. S. 676]

Patent for invention relating to reinforced concrete revetment. Findings of fact and opinion March 7, 1938; plaintiff entitled to recover. Judgment on accounting, opinion February 7, 1944; plaintiff's motion for new trial allowed in part and overruled in part May 1, 1944, and defendant's motion for new trial overruled; and conclusion of law filed February 7, 1944, amended.

Defendant's motion, filed June 13, 1944, for extension of time under Rule 99 (b) of the Court of Claims, allowed June 13, 1944.

Defendant's petition for appeal to the Supreme Court filed July 26, 1944.

Defendant's petition for writ of certiorari filed in the Supreme Court September 2, 1944.

On November 20, 1944, the following opinion was rendered by the Supreme Court:

> Per curiam: The appeal is dismissed for want of jurisdiction. Act of December 17, 1930; *Colgate* v. *United States*, 280 U. S. 43; *Assiniboine Indian Tribe* v. *United States*, 292 U. S. 606. Cf. *United States* v. *Goltra*, 312 U. S. 203, 204, n. 1. The petition for writ of certiorari is denied for the reason that application therefor was not made within the time provided by law. Act of December 17, 1930.

The concluding paragraph of the Act of December 17, 1930 (46 Stat. 1970), is as follows:

> Either party may appeal to the Supreme Court of the United States upon any such question where appeals now lie in other cases, arising during the progress of the hearing of said claim, and from any judgment in said case, at any time within ninety days after the rendition thereof; and any judgment rendered in favor of the claimants shall be paid in the same manner as other judgments of said Court of Claims.

See Title 28, section 288, U. S. Code; Rule 99, 99 (a) of the Court of Claims; and Rule 41 of the Supreme Court as amended March 25, 1940.

THE UNITED STATES, PETITIONER, v. STANDARD RICE COMPANY, INC.

[No. 45584]

[101 C. Cls. 85; 323 U. S. 106]

On writ of certiorari (322 U. S. 725) to review a judgment of the Court of Claims holding that the plaintiff was entitled to recover the amount, subsequently withheld by the Government from sums admittedly due to plaintiff for overpayments of income taxes, representing unpaid processing taxes claimed by the Government to be due under the contract involved.

The judgment of the Court of Claims was *affirmed* December 4, 1944.

Mr. Justice DOUGLAS delivered the opinion of the court, stating:

1. A contract for the sale of material to the United States contained the following provision: "Prices bid herein include any federal tax heretofore imposed by the Congress which is applicable to the material on this bid. Any sales tax, duties, imposts, revenues, excise or other taxes which may hereafter (the date set for the opening of this bid) be imposed by the Congress and made applicable to the material on this bid will be charged to the Government and entered on invoices as a separate item." *Held* that the United States was not entitled to recover from the contractor processing taxes imposed by the Agricultural Adjustment Act, which taxes were "applicable" to the material within the meaning of the contract, but which, because subsequently adjudged invalid, were never collected from the contractor. *United States* v. *Kansas Flour Mills Corp.*, 314 U. S. 212, distinguished.

2. Generally the United States as a contractor is to be treated as other contractors, and a contract which it draws is not to be judicially revised because it may have been improvident.

Mr. Justice BLACK dissented.

THE UNITED STATES, PETITIONER, v. LOUIS TOWNSLEY

[No. 45097]

[101 C. Cls. 237; 323 U. S. 557]

On writ of certiorari (323 U. S. 557) to review a judgment of the Court of Claims holding that where an employee of the Panama Canal was employed and paid on a monthly basis, working 8 hours per day, 6 days a week, under Section 23 of the Act of March 28, 1934 (48 Stat. 522; U. S. Code, Title 5, Section 673c.) 40 hours per week was set as the regular work period for plaintiff's job and payment of time and a half for overtime was directed under the statute, and, accordingly, plaintiff was entitled to recover on the basis of time and a half for plaintiff's sixth day of work in each week throughout the period of his employment.

The judgment of the Court of Claims was, on January 15, 1945, affirmed by the Supreme Court.

Mr. Justice ROBERTS delivered the opinion of the Supreme Court, holding:

One employed by the Panama Canal as operator, chief operator, and master of a dredge was engaged in one of the "trades or occupations" whose compensation was set "by wage boards or other wage-fixing authorities" within section 23 of the Independent Officers Appropriation Act of March 28, 1934 (48 Stat. 522) re-establishing wages of public employees at the level of June 1, 1932, subject only to the applicable percentage reductions provided by the Economy Acts.

The fact that compensation of a Panama Canal Zone employee is fixed on a monthly basis does not exclude him from the benefits of section 23 of the Independent Offices Appropriation Act of March 28, 1934 in so far as it provides for overtime compensation for services in excess of 40 hours per week, notwithstanding the statute in terms relates to "weekly compensation" or "weekly earnings."

Administrative practice prior to the adoption of a statute is of no moment in construing it.

Administrative practice requiring employees paid by the month to work overtime without additional compensation, in the teeth of a statute requiring the payment of compensation for overtime and a ruling by the Comp-

troller General that the statute was applicable to monthly employees, cannot affect the meaning of the statute.

In calculating the overtime compensation for time worked in excess of 40 hours per week, of a Government employee compensated on a monthly basis, the proper method of ascertaining the daily wage rate is not to divide the monthly pay by 30, but to multiply the monthly pay by 12 and divide the result by 52 to obtain the weekly salary, which is to be divided by 5 to obtain the rate for an eight-hour day, and multiply the number of weeks in which the employee worked a sixth day by the ascertained daily wage plus one-half thereof.

Mr. Justice MURPHY concurred in the result.

The Chief Justice, Mr. Justice JACKSON and Mr. Justice RUTLEDGE dissented.

LENA ROSENMAN AND THE NATIONAL CITY BANK OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED, PETITIONERS, v. THE UNITED STATES

[No. 45197]

[101 C. Cls. 437; 323 U. S. 658]

Certiorari (323 U. S. 691) to review a judgment of the Court of Claims holding that where on December 24, 1934, executors remitted to the Collector check for $120,000.00 "as a payment on account" of estate tax, which amount was placed by the Collector in a suspense account to the credit of the estate; and where final determination of the total net tax due was made, after audit, in April, 1938; the remittance of December 24, 1934, which was a payment of estate tax estimated to be due, was a payment of estate tax, and the statute of limitations (47 Stat. 169,283) began to run on the day it was paid, and claim for refund filed on March 26, 1938, more than three years after payment was made, was barred, and plaintiffs were not entitled to recover any part of the $120,000.00.

The judgment of the Court of Claims was *reversed* by the Supreme Court, January 29, 1945.

Mr. Justice FRANKFURTER delivered the opinion of the Supreme Court, holding:

Claims for refunds of Federal taxes must conform strictly to the requirements of Congress.

In the absence of extraneous relevant aids to construction, statutory provisions couched in ordinary English will be given the meaning which the words ordinarily convey.

A payment on account of a Federal estate tax prior to its assessment, made for the purpose of avoiding penalties and interest and held by the Collector in a suspense account to the credit of the estate pending assessment of the tax, is not such a payment as is contemplated by the statutory provision which requires claims for refunds to be presented within three years next after the payment of the tax.

A claim for refund of Federal estate tax did not arise within statute requiring such claims to be presented within three years after payment of tax until deficiency was assessed by commissioner though executors in order to avoid penalties and interest had previously remitted to collector estimated amount of tax which was placed in suspense account to credit of estate; and "payment of tax" so as to start running of three-year statute of limitations against claim for refund did not occur until funds were applied in partial satisfaction of deficiency assessment and balance thereof was paid by executors.

Exaction of interest from the Government requires statutory authority.

MOLLIE NETCHER NEWBURY v. THE UNITED STATES

[No. 45597]

[*Ante*, p. 192; 323 U. S. 802]

Income tax; deduction for depreciation of trust property not allowable to beneficiary; Section 23 (l), Revenue Act of 1934; 48 Stat. 689. *Commissioner* v. *Netcher*, 143 Fed. (2d) 484, cited.

Decided October 2, 1944; plaintiff not entitled to recover and petition dismissed. *Ante*, page 192.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court January 29, 1945.

THE UNITED STATES, PETITIONER, v. BRAND INVESTMENT COMPANY

[No. 44617]

[*Ante*, p. 40; 324 U. S. —]

Government contract; unjustified stop order a breach of contract; proportionate part of main office overhead recoverable for delay.

Decided June 5, 1944; judgment for plaintiff. Defendant's motion for new trial overruled October 2, 1944. *Ante*, p. 40.

Defendant's petition for writ of certiorari *denied* by the Supreme Court, February 26, 1945.

GLOBE INDEMNITY COMPANY, A CORPORATION, PETITIONER, v. THE UNITED STATES

[No. 44900]

[*Ante*, p. 21; 324 U. S. —]

Government contract; changes ordered by the contracting officer not approved by the head of department as required by articles 3 and 4 of the standard construction contract.

Decided May 1, 1944; plaintiff not entitled to recover and petition dismissed. Plaintiff's motion for new trial overruled October 2, 1944. *Ante*, p. 21.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court March 5, 1945.

ESTATE OF ISAAC G. JOHNSON, PETITIONER, v. THE UNITED STATES

[No. 45784]

[*Ante*, p. 312; 324 U. S. —]

Capital stock tax; corporation engaged in liquidation of estate property "doing business" under the applicable tax statutes and regulations; decision in Johnson v. United States, 92 C. Cls. 483, overruled by decision in the *Magruder* case, 316 U. S. 69.

Decided October 2, 1944; plaintiff not entitled to recover and petition dismissed. *Ante*, p. 213.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court March 5, 1945.

RONALD L. TREE AND NANCY PERKINS FIELD TREE, HIS WIFE, PETITIONERS, v. THE UNITED STATES

[No. 45025]

[*Ante*, p. 128; 324 U. S. —]

Income tax; annual payments received as compromise of claim for dower taxable as income; income taxable to beneficiary under section 162 (b) of the Revenue Act of 1928.

Decided June 5, 1944; plaintiffs not entitled to recover for the years 1930 and 1931 as to payments made to Nancy Perkins Field Tree and plaintiffs entitled to recover for the year 1931 as to capital net loss. *Ante*, p. 128.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court March 5, 1945.

INDEX DIGEST

BANK STOCK HOLDING COMPANY.

I. Where plaintiffs, stockholders in a bank stock holding company, accepted and held certificates of stock on each of which was printed a promise by the holder that he would be liable for his proportionate share of any statutory liability imposed on the holding company as the owner of shares in the bank; and where on the basis of this promise, and as a result of court decisions that the holders of shares in the holding company were "shareholders" in the bank within the meaning and purpose of the statute making shareholders in national banks liable to assessments, such assessments were enforced against shareholders in the holding company; it is *held* that plaintiffs were stockholders in the bank only in the sense that they came within the purpose and equity of the statute imposing liability, but plaintiffs have no right of action

CONTRACTS.

I. Where, in connection with a Government contract, the contractor did additional work such as was contemplated by article 4 of the standard Government construction contract, providing for changes in the plans and specifications when the subsurface conditions encountered differed from conditions indicated by the specifications; and where the change in question was one ordered by the "contracting officer," as that term is defined in the contract, but was not approved in writing by the head of the department, or his representative, as required by article 3 and article 4 of the contract, and plaintiff is not entitled to recover. *Globe Indemnity Company*, 21.

II. Where it is held that the defendant is not indebted to the contractor; the contractor's surety is not entitled to recover. *Id.*

III. Where the Government has failed to present proof that a stop order issued to a contractor, resulting in delay in completion, was justified; it is *held* that the stop order was a breach of the contract, and plaintiff is entitled to recover. *Brand Investment Company*, 40.

IV. Where the Government was responsible for the delay in completion of construction contract, it is *held* that the contractor, plaintiff, is entitled to recover a proportionate part of its main office overhead during the period of delay. *Id.*

V. While such an element of damage can never be proved with mathematical accuracy, it is standard accounting practice to attribute main office expense to various company operations on some fair basis. *Id.*

VI. Where the Government, in breach of its contract, by delaying completion in effect condemns a contractor's valuable and useful machines to a period of idleness and uselessness; it is *held* that the Government should make compensation comparable to what would be required if it took the machines for a temporary period but did not in fact use them, and as a jury verdict the court allows the proved rental value of the equipment discounted by one-half because of the absence of actual use with its resulting wear and tear. *Phoenix Bridge Company* v. *United States*, 85 C. Cls. 603, is overruled. *Id.*

CONTRACTS—Continued.

ment therefor; it is *held* that plaintiff is not entitled to recover. *Massman Construction Company*, 699.

XXXI. Where at the time the contract was awarded to the plaintiff, pursuant to its bid, and at the time it signed the contract, it had become aware of the mistake in its bid; and where at that time the Government was also aware of the plaintiff's claim that it had made a mistake in its bid; there was neither (1) mistake of fact on the part of the plaintiff and unconscionable conduct on the part of the Government or (2) mutual mistake of fact which would justify that the contract should be reformed and enforced as reformed. *Id.*

XXXII. The instant case is distinguished from the case of *Rappoli* v. *United States*, 98 C. Cls. 499, in the respect that in the *Rappoli* case the court found that concurrently with the signing of the contract, the Government's agents promised the contractor that, upon the fulfillment of certain conditions that were found by the court to have been fulfilled, the mistake would be corrected. *Id.*

XXXIII. Where the contract was terminated by the Government for contractor's failure to proceed with due diligence; and where, by agreement, the surety took over the performance of the contract and was substituted as the prime contractor, subject to the obligations of the contract and entitled to all rights and benefits accruing under it; it is *held* that plaintiff, surety, is entitled to bring suit for excess costs incurred, if any. *Fidelity and Casualty Co.* v. *United States*, 81 C. Cls. 495. *Standard Accident Ins. Co.*, 770.

XXXIV. Where surety, by agreement, took over a Government contract which had been terminated by the Government because of contractor's failure to proceed with due diligence; and where excess costs were incurred by plaintiff, surety, it is immaterial whether plaintiff employed the original contractor, or another, to complete the work. *Id.*

XXXV. Where plaintiff incurred extra costs in carrying out orders of the superintendent of construction without protest to the contracting officer,

CONTRACTS—Continued.

for which defendant was responsible nor the damages caused thereby. *Id.*

XLII. Where the plaintiff, an Illinois corporation chartered in 1913, was dissolved by an Illinois court on June 8, 1931, and its charter and authority declared null and void, for failure to file statutory reports and State franchise taxes, and where, on February 29, 1936, the same court, upon a finding that plaintiff had filed all necessary reports due up to that date and had paid all franchise taxes and penalties thereon, entered a decree vacating its previous order of dissolution; it is *held* that the corporation which had been previously dissolved was by the later decree reinstated and reclothed with all its former powers as if the original decree had never been entered (*Ruthfield* v. *Louisville Fuel Company*, 312 Ill. App. 415, 38 N. E. 2d, 832) and plaintiff, at the time the instant suit was brought, January 12, 1938, had the capacity to sue. *Holpuch Company*, 795.

XLIII. In the instant case, the decree vacating the previous decree dissolving the plaintiff corporation was intended to put the corporation in the same situation it would have been in had it paid its franchise taxes when due. *Id.*

XLIV. It would be inequitable for the State of Illinois to collect taxes levied on the privilege of doing business as a corporation and at the same time deny to the corporation the right to exercise that privilege. *Id.*

XLV. It was the purpose of the decree vacating the dissolution decree to give validity to all acts done in the meantime; and, hence, plaintiff is empowered to maintain an action for breach of a contract entered into between the date of the decree dissolving the corporation and the date of the decree vacating it. *Id.*

XLVI. Where under the provisions of the construction contract between plaintiff and defendant, all disputes concerning questions of fact arising under the contract were to be decided by the contracting officer, whose decisions were final, subject to written appeal to the head of department; and where there was no written appeal from the contracting officer's finding that the plaintiff was not proceeding with due diligence;

INDIAN CLAIMS—Continued.

and the tribe was given power, with the approval of the Secretary of the Interior, to make mineral leases, the royalties to go into the common funds of the tribe, which were held by the Government, and where oil and gas leases were made and the royalties paid by the producing companies; the State of Oklahoma was unable to tax the production, either directly or indirectly, since the minerals were under the protection of the Federal Government. *Indian Territory Illuminating Oil Co.* v. *State of Oklahoma*, 240 U. S. 522; *Large Oil Co.* v. *Howard*, 248 U. S. 549. *Id.*

VI. Where under section 5 of the Act of March 3, 1921 (41 Stat. 1249) Congress gave to the State of Oklahoma authority to levy and collect a gross production tax on oil and gas produced in Osage County, the Secretary of the Interior to pay out of tribal funds the tax on the tribe's royalty share, which was done; and where, in addition under said section 5 of said 1921 Act, the Secretary was authorized to pay to Osage County, for roads and bridges one per cent of the royalties received by the tribe; it is *held* that the Act of 1921 did not deprive the tribe of its property without due process of law and did not take the tribe's property for public use without just compensation, in violation of the Fifth Amendment. *Id.*

VII. The tribe received a special benefit from the expenditures of the money for roads and bridges in Osage County, and it was, therefore, within the constitutional power of Congress to direct that the funds be so spent, for the benefit of the tribe, which at that time owned all the oil and gas in place in the county, and was receiving all the royalties that were being paid. *Id.*

VIII. A legislature or other taxing body may make a rational classification of property for taxing purposes, without violating the Federal Constitution. *Hart Refineries* v. *Harmon, Treasurer*, 278 U. S. 499. *Id.*

IX. The power of Congress, in its management of the funds and property of the Indians, is broad, and the wisdom, or lack of it, in the exercise of the power, will not be reviewed by the courts so long as it is management, and not spolia-

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XV. Following the decision in *Menominee Tribe of Indians* v. *United States*, 97 C. Cls. 158, 161, it is *held* that the Act of February 12, 1929 (45 Stat. 1164) has no application to a fund representing interest which had accrued on other funds, and plaintiff is not entitled to recover on this part of its claim, for interest on interest. *Id.*

XVI. Where in its original petition, filed on December 1, 1938, plaintiff complained of withdrawals from the "Menominee Log Fund" for operations under the Act of 1908 only, without any mention of withdrawals under the Act of 1906; and where, on the same date, plaintiff filed a bill for general accounting, in response to which the Comptroller General's report showed withdrawals under the 1906 Act, later supplemented by the 1908 Act; plaintiff's motion, which was properly granted, for leave to amend its petition by consolidating with said petition the petition for general accounting, was timely. *Id.*

XVII. In a petition by the "ward" for a general accounting by its "guardian"; it is not necessary to point to any specific wrongful act of the guardian. *Id.*

XVIII. Upon remand by the Supreme Court, it is *held* that as to payments made from 1870 to 1874 directly to the tribal treasurer of the Seminole Nation and to designated creditors of the Nation, pursuant to requests of the Seminole General Council, it is not established by the evidence adduced that the General Council, during the years in question, was corrupt, venal and false to its trust, and it is not established that such venality and corruption were known to the administrative officers of the Government charged with the disbursement of Indian moneys. (Item No. 2, a claim based upon the defendant's obligation under Article VIII of the Treaty of 1856 to pay to the tribe annually $25,000 to be distributed per capita. 93 C. Cls. 500, 518; 316 U. S. 286). *Seminole Nation* (L–51 and L–208), 565.

XIX. As to fraud and corruption during the period from 1870 to 1874, the only evidence before the Commissioner of Indian Affairs at the time he authorized the payments to the tribal treasurer

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during this period, as requested by the General Council of the tribe, were the reports of the Indian Agent, the information contained in which was not sufficient to justify the conclusion that the Commissioner had knowledge of the fact that the General Council was corrupt, venal and false to its trust. *Id.*

XX. Upon remand by the Supreme Court, it is *held* that as to payments made to the tribal treasurer during the years 1899 to 1907, it is not established by the evidence adduced that the General Council, during the years in question, was corrupt, venal and false to its trust, nor that such venality and corruption were then known to the disbursing officer of the Government. (Item No. 5, a claim for all moneys paid to the tribal treasurer after the passage of the Curtis Act of June 28, 1898. 93 C. Cls. 500, 521; 316 U. S. 286). *Id.*

XXI. A disbursement to officials of the tribe who were known to be corrupt, venal and false to their trust would be an "illegal" disbursement but the mere allegation in plaintiff's petition that the sums were "illegally disbursed," without any statement of facts to support the charge of illegality, is an insufficient allegation of fraud because it complies with neither Section 159 of the Judicial Code nor with Rule 10 of the Court of Claims. *Merritt* v. *United States*, 267 U. S. 338, 341, cited. *Id.*

XXII. Where plaintiff in its original petition in the instant case made no claim based on the illegality of the disbursements involved in Item 2; and where no amended petition was filed within the time permitted by the Special Jurisdictional Act, setting up this ground of recovery, there is grave doubt that the Court of Claims has jurisdiction to consider the question of illegality on the ground of corruption but the court does not pass on the question of jurisdiction since the plaintiff is not entitled to recover on the merits. *Id.*

XXIII. Where, as to Item 5, plaintiff in its petition based its right to recover on the violation of Section 19 of the Curtis Act; but where, nevertheless, plaintiff did allege that as to the years 1899 to 1907 the tribal officials were corrupt and intro-

INDIAN CLAIMS—Continued.

duced proof to support this allegation; it is *held* that the court has jurisdiction to pass upon the question of corruption, a petition setting up the facts having been filed within the time fixed by the Jurisdictional Act. *Id.*

XXIV. In the treaties and agreements with the Indian tribes, and the Acts of Congress relating thereto, there is implied on the part of the United States an obligation to carry out their terms with the fidelity a fiduciary owes to its ward. *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, and *Creek Nation* v. *United States*, 318 U. S. 629, distinguished; *Memoninee Tribe* v. *United States*, 101 C. Cls. 22, cited. *Id.*

XXV. Where another tribe was settled on a part of plaintiff's lands due to an erroneous survey and these lands were later allotted to them and patented to white settlers, following the decisions in *Creek Nation* v. *United States*, 295 U. S. 103 and 302 U. S. 620 (F–205), it is *held* that the defendant took plaintiff's lands on the dates the defendant allotted them to the Pottawatomies in severalty in 1892 and from the dates of the patents to white settlers, from 1895 to 1913. *Shoshone Tribe* v. *United States*, 299 U. S. 476, distinguished. *Id.*

XXVI. The valuation of $7.00 per acre for all the lands so taken, 10,351.82 acres, is held to be fair and equitable, from all the testimony produced, and the plaintiff is entitled to recover this amount, $72,462.74, plus interest at 4 percent per annum from 1899, by which time about one-half of the acreage had been allotted or patented, to date of judgment, or $130,215.54; a total of $202,678.-28. *Id.*

XXVII. Where by the Act of July 27, 1868 (15 Stat. 199, 214), Congress appropriated $31,083.79 for subsisting the Seminole Indians and provided that this amount should be deducted from any funds belonging to them; and where on the former trial of No. L–51, the plaintiff admitted that the defendant was entitled to this offset, which was thereupon allowed by the court (93 C. Cls. 525), this finding is reaffirmed. *Id.*

XXVIII. Where Congress, in the Act of March 3, 1873 (17 Stat. 626), authorized the purchase at $1 per acre of an additional 175,000 acres of land from

INDIAN CLAIMS—Continued.

the Creeks, which were conveyed to the Seminole Nation, this was not the discharge of any legal obligation incurred but was merely the gratuitous correction of an unfortunate error that had been made, and under the provisions of the Act of March 12, 1935 (49 Stat. 571, 596), is to be offset against any amount due to the Seminole Nation. (93 C. Cls. 526). *Id.*

XXIX. No officer of the Government has the power to bind the United States, in the absence of Congressional authority to do so. Cf. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 494; *United States* v. *North American Co.*, 253 U. S. 330, 333. *Id.*

XXX. Where an Indian agency was maintained for the purpose of carrying out the provisions of treaties with the Indians, the expenses of such agency are not gratuities. *Blackfeet et al* v. *United States*, 81 C. Cls. 101, 137, and 138, and *Shoshone Tribe* v. *United States*, 82 C. Cls. 23, 93, 94, distinguished. *Id.*

XXXI. Upon review by the court, the holding that agency expenses are allowable as gratuities (93 C. Cls. 529) is held to be in error. *Id.*

XXXII. The expenses of the Dawes Commission appointed under the Act of March 3, 1893 (27 Stat. 645), for the purpose of securing agreements from the Indian Tribes permitting the allotment of the tribal lands in severalty and the survey and allotment of such lands under the Seminole Agreement (30 Stat. 567) and the Supplemental Seminole Agreement (31 Stat. 250) were expenses incurred by the defendant in the performance of a duty which the defendant had agreed to perform and, cannot be regarded as gratuities. *Id.*

XXXIII. In the former opinion in No. L–51, the allotment expenses of the Dawes Commission were allowed as gratuities (93 C. Cls. 532) on the authority of *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 366, 371; the Choctaw case is now distinguished on the ground that the agreement under construction in the *Choctaw* case had specifically provided that the United States should bear certain expenses incident to the breaking up of tribal ownership and that the claim there asserted by the plaintiff (Choctaw

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Nation) was to recover other expenses charged to it which had not been assumed by the United States (91 C. Cls. 371), whereas in the instant case the agreement was altogether silent as to who should bear any part of the expenses; these expenses are now disallowed as gratuities. *Id.*

XXXIV. It is for the defendant to show by proof that expenditures made in connection with the change from tribal to individual ownership were gratuities, which has not been done in the instant case. *Id.*

XXXV. Where it is admitted by the defendant that a part of the item of $135,219.60 for office expenses (finding 38) was incurred by the Dawes Commission in negotiating agreements with the Indian tribes and that so much of this item should not be charged as a gratuity; and where there is no satisfactory proof to show how much, if any, of the item should be charged as a gratuity, the entire item must be disallowed. (See 93 C. Cls. 513, 533). *Id.*

XXXVI. Except for the items specifically referred to in the court's opinion, the former findings and opinion with reference to the expenditures listed in findings 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the former opinion (93 C. Cls. 500) as modified by findings 32, 33, 34, 35, 37, 38 and 39 of the instant opinion, are adopted and reaffirmed. *Id.*

XXXVII. It is *held* that the defendant is entitled to offset against the amount due plaintiff, which is $221,066.28, items aggregating $221,569.20; and since the amounts held to have been spent by the defendant gratuitously for plaintiff's benefit exceed the amount plaintiff is entitled to recover, plaintiff's petitions are dismissed. *Id.*

XXXVIII. Article VIII of the Treaty of August 6, 1846, with the Cherokee Nation providing for payment to the Cherokee Nation of $20,000.00 "in lieu of all claims of the Cherokee Nation, as a nation, prior to the treaty of 1835," except all lands reserved for school funds, constituted a complete compromise and settlement of any claim for deficiences, if any, in the delivery of goods pursuant to the annuity provisions of the treaties of 1794 and 1798. (Claim No. 1). *Cherokee Nation, L–46 and L–268*, 720.

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XXXIX. With respect to plaintiff's claim that there was a shortage in the number of acres sold by the United States and the proceeds invested in a school fund for the Cherokees, in accordance with the treaty of February 27, 1819, by which the Cherokee Nation ceded to the United States a tract "12 miles square" for that purpose; it is *held* that the tract, as described in the cession, was not a perfect square and it is not possible to determine from the evidence exactly how many acres of salable land the tract did contain. (Claim No. 2.) *Id.*

XL. Where it is apparent, from the legislative history of the acts of Congress passed during the war period that it was the intent of Congress to divert the school land funds of the hostile Indian tribes to the relief of loyal Indians, who were destitute; it is *held* that Congress had the power so to deal with the property of hostile tribes. (Claim No. 2.) *Id.*

XLI. The expenditure of a part of the Cherokees' funds for the relief of destitute loyal Indians of other tribes, while the Cherokees were in a state of hostility to the United States, did not, under the relevant acts of Congress and the Treaty of July 19, 1866, create any liability on the part of the United States to restore the amounts so expended to the Cherokees' funds. (Claim No. 2.) *Id.*

XLII. Where in its petitions the plaintiff asserted that before the petitions were written its accountants had worked for several years on the accounts involved, which were accordingly presented to the court in definite form and generally for specific amounts; and where the Government in preparing its defense called upon the General Accounting Office to furnish an accounting in response to the claims made in the plaintiff's petitions which was done, requiring several additional years' work; the court will not remand the case for a further accounting to determine the nature of an item of $504.33, not included in petition, which on June 30, 1891 was withdrawn from the Cherokee school funds and returned to the United States Treasury, seeming to indicate a liability on the part of the Government but which might well be explained

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if studied by accountants aware that a claim was being based upon it. (Claim No. 3.) *Id.*

XLIII. In the absence of any showing to the contrary, it is held that the United States had the usual right of a trustee to reimburse itself out of the funds held in trust for plaintiff for its necessary out-of-pocket expenses in the administration of the trust. (Claim No. 4.) *Id.*

XLIV. The appropriation by Congress of $50,000.00 for the purchase from the Cherokees of lands which were later sold to the Ponca Indians, in accordance with the agreements made by the parties, for a sum of $48,389.46, which was deposited to the credit of the Cherokees, did not entitle the Cherokees to interest until the price was agreed on and the purchase was in fact made. (Claim No. 5.) *Id.*

XLV. Where the United States, by agreement with the Cherokees, sold some of the Cherokees' lands to the Osage Tribe and agreed to put the proceeds into an interest-bearing trust fund for the Cherokees, the plaintiff was not entitled to interest from the date of the appropriation for this purpose but from the date of certification, under the provision of the Act of March 3, 1873, that interest should begin "whenever the amount to be so transferred shall be certified to the said Secretary of the Treasury by the Secretary of the Interior." (Claim No. 6.) *Id.*

XLVI. The Government is not liable for interest unless it has promised to pay it, or unless interest is granted as a measure of just compensation for a past taking of property. (Claims Nos. 7 and 8.) *Id.*

XLVII. Where Congress in the Act of March 3, 1893, provided for interest on each deferred installment of the amount agreed to be paid for the tract of land known as the "Cherokee Outlet," until each installment was due, the Act setting March 4, 1895, as the due date of the first installment; and where the amount for the first installment was duly appropriated by Congress and was deposited in the United States Treasury on March 4, 1895 to the credit of the Cherokee Nation for payment to the Delawares, Shawnees and Freedmen, who had been determined by that time to be entitled to approximately one-

INDIAN CLAIMS—Continued.

fifth of the purchase price; and where interest on the first installment was computed by the United States at 4 per cent from March 3, 1893, to March 4, 1895, and paid to the Cherokee Nation, but no interest was computed by the United States or paid to the Cherokee Nation on the amount of the installment after March 4, 1895; it is *held* that there was no promise to pay interest upon the first installment after it was due and had been made available to those entitled to receive it and plaintiff is not entitled to recover. (Claim No. 8.) *Id.*

XLVIII. Where certain expenses were incurred in connection with the distribution to the Shawnees and the Cherokee Freedmen of their proportionate part of the price paid by the United States for the purchase of the Cherokee Outlet which were charged to the fund distributed; and where the Cherokee Nation was entitled to the balance of the fund, if any, after such distribution; it is *held* that the charging of these expenses to the fund amounted to charging them to the Cherokee Nation and plaintiff is entitled to recover. (Claim No. 9.) *Id.*

XLIX. Where a claim was not pleaded with particularity in the petitions but all the relevant facts are properly in evidence, the court will decide the claim on the merits; but where such claims, not pleaded, are not shown to have been illegal disbursements recovery is not allowed. (Claims Nos. 6, 8, 12, 13, 14.) *Id.*

L. The items not involved in the "Slade and Bender accounting" (House Ex. Doc. No. 182, 53rd Congress, 3rd session) and items which Slade and Bender may have considered and rejected on their merits, as the accountants viewed them, were not sued for in the case of *Cherokee Nation* v. *United States* (No. 23199), 40 C. Cls. 252; affirmed 202 U. S. 101; they were not adjudicated "on their merits" within the meaning which Congress must have intended to give this phrase in the jurisdictional act (43 Stat. 27) under which the instant suits (Nos. L–46 and L–268) were brought, and the court has, therefore, not regarded them as excluded from consideration by the litigation which followed the Slade and Bender report. *Id.*

INDIAN CLAIMS—Continued.

LI. It having been found that the plaintiff in the instant suits is entitled to recover the sum of $25,240.72 from the United States, as set forth in the findings of fact and opinion, this liability is cancelled by an offset of like amount out of the $142,066.22 found to have been expended gratuitously for the plaintiff by the United States, as shown by the report of the General Accounting Office, filed September 27, 1937, under the Act of August 25, 1935 (49 Stat. 571); and the plaintiff's petitions are dismissed. *Id.*

LII. It is *held* that upon the proof presented, and in accordance with the treaties with the plaintiff tribe, and under the terms of the special jurisdictional act (43 Stat. 886), the defendant has taken and appropriated to its own use the land lying west of Quinaielt Lake and between a line drawn from the 32½ Mile Post on the meander of the Lake, in accordance with the Executive Order of November 4, 1873, to the northwest corner of the reservation and a line drawn from the 28½ Mile Post on the meander of the Lake, in accordance with the Executive Order, to the northwest corner of the reservation. *Quinaielt Tribe* (L–23), 822.

LIII. What part of the value of the land so taken the plaintiff is entitled to recover does not appear from the proof, and judgment is reserved for further proceedings under Rule 39 (a). *Id.*

LIV. Under the treaty entered into between the United States and the different tribes and bands of Quinaielt and Quillihute Indians (12 Stat. 971), it was provided (article VI) that these tribes might be consolidated with other friendly tribes or bands for the purpose of occupying and enjoying the reservation; and when the Executive Order establishing the reservation was issued it set aside the reservation not only for the Quinaielts and the Quillihutes but also for the Hohs, Quits and other tribes of fish-eating Indians on the Pacific Coast; and under the decision in *Halbert* v. *United States*, 283 U. S., the Chehalis, Chinook, and Cowlitz tribes were entitled to equal rights in the reservation because they came within the designation of fish-eating Indians on the Pacific Coast. *Id.*

TAXES—Continued.

Income Tax—Continued.

V. (5) A corporation organized for profit, the stock of which was owned by some, but not all, of the members of a farmers' cooperative association, and the by-laws of which provided for a distribution of all of its net profits in excess of 18 per cent to such members of the farmers' associations, whether stockholders or not, as did business with it, in proportion to the business each had done, was entitled in its income tax return to a deduction, as an expense of doing business, of the sums so distributed. *Greene County Farmers*, 105.

VI. (6) The amounts distributed were rebates to purchasers and reduced by so much the total amount received for goods sold. *Id.*

VII. (7) The rebates were not given to stockholders but only to customers whose contracts entitled them to such rebates; and the obligation to pay such rebates was in each case an enforceable legal liability; and as such the plaintiff was entitled to the deduction as a reduction of the amounts which it in fact received for its goods sold. *Uniform Printing & Supply Co.* v. *Commissioner*, 88 Fed. (2d) 75, *Plymouth Brewing & Malting Co.* v. *Commissioner*, 16 B. T. A. 123, Merten's Law of Federal Income Taxation, Vol. 4, par. 25.111. *Id.*

VIII. (8) Where plaintiff, a corporation, had on deposit a sum of money in a bank which was placed in the hands of a liquidator in 1934; and where during the year 1934 plaintiff was unable to obtain from the Bank Commissioner, or his agent in charge, a statement as to the approximate amount, if any, plaintiff would be paid on final liquidation; it is *held* that plaintiff was not entitled to deduct as a loss any part of the deposit in its income tax return for the year 1934. *Id.*

IX. (9) The mere statement of the bank liquidator that he could not then say, in 1934, what amount of plaintiff's deposit would be paid and that probably payment in full would not be made, is not sufficient to establish that the debt was worthless, in whole or in part, in 1934. *Id.*

X. (10) Where plaintiff, a manufacturing corporation operating a plant at Frankford, Pa., and another at Northwood, a suburb of Philadelphia, Pa.,

TAXES—Continued.

Income Tax—Continued.

XV. (15) The word "suddenly", as used in Treasury Regulations preceding the word "terminated", relating to deductions by corporation for losses not compensated for by insurance, is a relative word, and was written to contrast with the word "gradual" which appears in the same paragraph; and the language of the whole regulation indicates that it was not intended to be limited to infrequent situations where by legislation or by catastrophe the supply of raw materials, or the market, has been destroyed in a day. See *S. S. White Dental Manufacturing Co.* v. *United States* (No. 44602), 93 C. Cls. 469. *Id.*

XVI. (16) The words, "proof of some unforeseen cause by reason of which the property has been prematurely discarded," as used in Treasury Regulations relating to losses by corporation not compensated for by insurance, mean only that the cause of its being discarded must have been unforeseen when the asset was acquired so that depreciation of its cost, on the basis of a short prospective use, would not have been an allowable deduction from income. *Id.*

XVII. (17) Where plaintiff, Nancy Perkins Field Tree, under a consent decree and agreement, settled her claim for dower in the estate of her deceased husband, Henry Field, receiving for the year 1920 one-third of the income for that year from the husband's share of the real estate and receiving thereafter a stated sum per year, which she agreed to accept in full satisfaction of her dower rights; and where for the years 1930 and 1931, the annual payments not having been included in the plaintiff's income tax return for those years, the Commissioner of Internal Revenue issued deficiency notices for those years and assessed and collected taxes, with interest, on the payments received in each of those years; it is *held* that the annual payments received from the estate were dower for tax purposes and as such were income taxable to plaintiff, and plaintiff is not entitled to recover. *Ronald L. Tree et ux.*, 128.

XVIII. (18) Following the decision in *Lyeth* v. *Hoey*, 305 U. S. 188, where plaintiff, as Henry Field's widow, claimed dower in the real estate in which under

TAXES—Continued.

Income Tax—Continued.

his grandfather's will her deceased husband had an interest; and where, her claim being doubtful and contested, plaintiff compromised for less than she would probably have received if her claim had been clear and uncontested; it is *held* that the payments for which she compromised, to be paid to her as dower would have been paid, were dower for tax purposes. *Id.*

XIX. (19) The payments made annually to plaintiff from the estate of her deceased husband's grandfather, under the court decree and agreement, were of the character of "income which is to be distributed currently by the fiduciary to the beneficiaries" and hence not taxable to the fiduciary under section 162 (b) of the Revenue Act of 1928 (45 Stat. 791, 838), which further provides that if such deduction is allowed, "the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries." *Id.*

XX. (20) Where the agreed annual payments to plaintiff were guaranteed by her deceased husband's brother, who was co-devisee of his grandfather's estate; and where plaintiff contends that under section 162 (b) the brother and not the plaintiff was the beneficiary, and that the income of the deceased husband's share, as income, was not the husband's but the brother's, and that the trustees of the estate were merely the brother's agents in making the annual payments to plaintiff pursuant to his promise; it is *held* that on this theory the consent decree and agreement would amount to an assignment by the brother to the plaintiff of a portion of the income from real estate which plaintiff's husband had owned, and as such it would not be taxable to the assignor but to the assignee, who owned the interest for her life and received the income. *Blair* v. *Commissioner*, 300 U. S. 5; *Commissioner* v. *Field*, 42 Fed. (2d) 820. *Id.*

XXI. (21) The agreement by the brother of plaintiff's husband to make up any deficit if the estate income was not sufficient to make the agreed annual payments to plaintiff did not change the nature of plaintiff's interest from either that of dow-

TAXES—Continued.

Income Tax—Continued.

plaintiff is not entitled to recover under Section 23 (e) (2) of the Revenue Act of 1936 as for a loss incurred in a "transaction entered into for profit, though not connected with the trade or business." *Plaut*, 290.

XXVIII. (28) Where in 1936 plaintiffs paid a lump sum in compromise and settlement of plaintiffs' entire liability for taxes and interest in respect of the years 1918 to 1920, inclusive, which compromise and settlement was accepted by the Government; and where the lump sum paid and accepted was less than the total of the tax deficiencies, without interest, claimed by the Government and computed in accordance with an opinion of the then Board of Tax Appeals; it is *held* that plaintiffs are not entitled to recover under section 821 of the Revenue Act of 1938. (52 Stat. 447; U. S. Code, Title 26, section 3794 *note*). *Pierce Oil Corporation*, 360.

XXIX. (29) The legislative history of section 821 of the Revenue Act of 1938 shows that section 821 was intended to apply only in those cases where the taxpayer paid his tax and also accrued statutory delinquent interest at 12 per cent per annum during the period from October 24, 1933, to August 30, 1935, by reason of failure to pay the taxes shown upon taxpayer's return or additional taxes assessed within 10 days after notice and demand. *Id.*

XXX. (30) In the enactment of section 821 of the Revenue Act of 1938, Congress was legislating for the relief of those few taxpayers who were unable to compromise and settle their accrued statutory liability for the 12 per cent delinquent interest rather than for the relief of those taxpayers who could and did compromise and settle their tax and interest liability. *Id.*

XXXI. (31) The settlement effected by plaintiffs was definitely a compromise for a lump sum of all tax liability, including interest, with reference to the years 1918 to 1920, inclusive, and it was not a compromise calling for payment out of the total sum offered of specific sums for specific liabilities on account of tax for each of the three years and interest in specific sums at certain rates for certain periods. *Id.*

TAXES—Continued.

Income Tax—Continued.

XXXII. (32) The allocation by the Government, for record and bookkeeping purposes, of the lump sum paid by plaintiffs is of no material importance in connection with the question whether plaintiffs are entitled to recover any portion of that amount. *Id.*

XXXIII. (33) Congress, in the enactment of section 821 of the Revenue Act of 1938, upon which the plaintiff in the instant case bases its suit, did not intend to give a taxpayer a new remedy which it would not otherwise have for recovery of any portion of an amount offered and accepted in compromise and settlement of the Government's claim for taxes and interest, especially where the amount so offered and accepted is less than the Government's claim for taxes without interest. *Id.*

XXXIV. (34) Where it is shown by the evidence that the participating preference stock of International Match Corporation became worthless in fact in 1932, and that in that year the dominant person in its parent corporation committed suicide and an examination in bankruptcy proceedings disclosed that assets were carried at grossly exaggerated or fictitious figures, and immediately thereafter the market value of the stock dropped from $21.25 to 12½ cents and never sold thereafter for a higher price than 27½ cents; it is *held* that the stock became worthless in 1932 and plaintiff is not entitled to recover on the basis that the stock became worthless in 1936. *Marks*, 508.

XXXV. (35) A taxpayer is not required, in order to show worthlessness, to exclude the remote possibility that the stock may have some slight value in the future. *United States* v. *White Dental Company*, 274 U. S. 398, cited: "A taxpayer is not required to be an incorrigible optimist." *Id.*

XXXVI. (36) Where plaintiff sues under a special jurisdictional act (54 Stat. 904) to recover damages arising from tax liens filed against his property through the alleged "gross carelessness" of the Commissioner of Internal Revenue in denying taxpayer an opportunity to be heard before assessment by the mailing of the 60-day deficiency notice to him at a place which was not his "last

TAXES—Continued.

Income Tax—Continued.

known address"; it is *held* that in Section 272 (k) of the Revenue Act of 1928 (45 Stat. 791) Congress had reference to taxpayer's regular or permanent address or residence and that the burden is upon the taxpayer to keep the Commissioner advised of a change of address, especially where, as in the instant case, a temporary address is given in connection with a trip indefinite and uncertain in duration. *Gregory*, 642.

XXXVII. (37) The mailing of the deficiency notice to taxpayer's last known address in the State in which he had filed his tax return was proper, and plaintiff is not entitled to recover. *Id.*

XXXVIII. (38) Special jurisdictional acts are to be strictly construed and they are not to be construed so as to concede liability on the part of the United States unless the language of the act in that regard is very clear. *Sioux Tribe of Indians* v. *United States*, 97 C. Cls. 613, 663–665 cited. *Id.*

XXXIX. (39) The legislative history of the special jurisdictional act (55 Stat. 904) under which the instant case was brought discloses no intention on the part of the Congress to concede liability. *Id.*

XL. (40) Where plaintiff's claim for damages is based on the effect of the tax lien filed on his property on August 13, 1931, and where plaintiff on receipt of the collector's letter of June 27, 1931, knew that he had not received the 60-day deficiency notice of March 11, 1931, and where plaintiff made no protest then nor later when he received the Commissioner's letter of September 24, 1931; it is *held* that plaintiff is not entitled to recover. *Id.*

XLI. (41) The remedy of injunction to prevent collection or enforcement of the assessment provided for in a proper case by *section 272 (a) of the Revenue* Act of 1928 was available to plaintiff for 47 days prior to August 13, 1931, and thereafter but no effort to invoke that remedy was made. *Id.*

XLII. (42) Even if it had been found that the assessment made in May, 1931 had been improper and not in strict accordance with the statute it was not void but voidable. *Lehigh Portland Cement Co.* v. *United States*, 90 C. Cls. 36, 49–51, 60–69. *Id.*

TAXES—Continued.

Tax On Adulterated Butter.

XLIII. (1) Where the butter which was the subject of the tax in the instant cases as adulterated butter had been manufactured by others and had been purchased wholesale by plaintiff and subsequently rechurned or reworked in churns by plaintiff; and where in such process of rechurning or reworking water was added; it is *held* that by the greater weight of the evidence submitted, which was conflicting, it is established to the satisfaction of the court that plaintiff did manufacture adulterated butter during the taxable period involved and that plaintiff in so doing engaged in manufacturing adulterated butter as a business within the meaning of the statute. (Section 4 of the Act of May 9, 1902; 32 Stat. 194, 196; U. S. Code, Title 26, section 2321.) *Best Butter Company*, 4.

XLIV. (2) The finding by the Commissioner of Internal Revenue upon the evidence before him that plaintiff was a manufacturer of adulterated butter as a business and the determination of the Commissioner as to the number of pounds of adulterated butter that plaintiff had produced upon which the taxes and penalties were assessed, were *prima facie* correct; and in a suit for refund plaintiff has the burden of showing that such determination and assessment are erroneous or illegal; and it is *held* that in the instant cases plaintiff has not sustained that burden of proof, since the record as a whole supports, rather than disproves, the determination and assessments of the Commissioner and the amounts thereof, and accordingly plaintiff is not entitled to recover. *Id.*

XLV. (3) Where only a portion of the butter taxed as adulterated butter, sold by the plaintiff, was actually sampled and tested as provided in the pertinent regulations; it is *held* that there is nothing in the statute taxing adulterated butter or in the regulations relied upon that prohibits the Commissioner from determining and taxing the amount of adulterated butter manufactured on evidence other than by taking samples and making formal tests, and in the instant cases such evidence was sufficient both for the Commissioner and the court, and plaintiff is not entitled to recover. *Id.*







